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TRANSCRIPT OF RECORD

Supreme Court of the United States

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No. [redacted] 117

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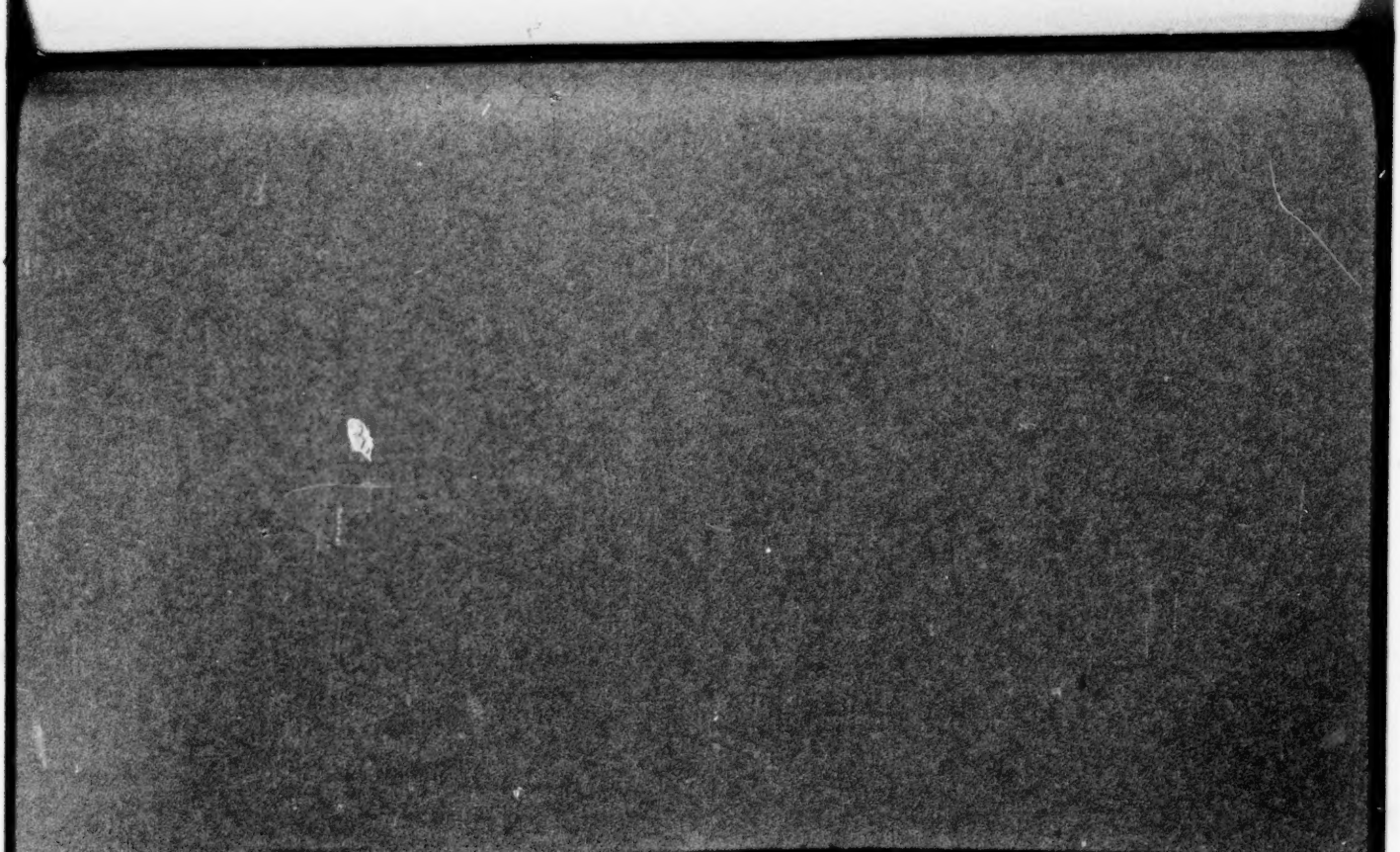

(32,176)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 609

DANIEL V. HARKIN AND UNION BANK OF CHICAGO, RECEIVERS, ETC., PETITIONERS,

vs.

EDWARD J. BRUNDAGE, RECEIVER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 30, 1926

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable James H. Wilkerson, District Judge of the United States for the Northern District of Illinois, on Thursday, ... day of July, in the year of our Lord one thousand nine hundred and Twenty-five, being one of the days of the regular July Term of said Court, begun Monday, the Sixth day of July, and of our Independence the 150th year.

Present:

Honorable James H. Wilkerson, District Judge.

Palmer E. Anderson, U. S. Marshal.

Charles M. Bates, Clerk.

In. 2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

United States Worsted Sales Company, a corporation,
vs.
Daniel Boone Woolen Mills, Inc., a corporation.
} Equity. No. 4660.

Be it remembered that heretofore, to-wit: on the Nineteenth day of February, A. D. 1925, came the above named complainant, by its Solicitors, and filed its Bill of Complaint, as follows:

3 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

United States Worsted Sales Company, a corporation,
Plaintiff
vs.
Daniel Boone Woolen Mills, Inc., a corporation,
Defendant
} Equity. No. 4660.

To the Honorable Judges of the District Court of the United States in and for the Northern District of Illinois, Eastern Division.

The complainant, United States Worsted Sales Company, a corporation, duly organized and existing under the laws of the State of New York, and a citizen of said state, brings this, its bill of complaint, on its own behalf and on behalf of all creditors of the defendant, Daniel Boone Woolen Mills, Inc., who may hereafter join in the prosecution of this suit against said Daniel Boone Woolen Mills, Inc., a corporation, organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of said state, respectfully shows and represents into the court:

1. The complainant is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its principal office in New York City in said state, and is a citizen and resident of said state.

2. The defendant, Daniel Boone Woolen Mills, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business at Chicago, in said state, and is a citizen and resident of said state.

3. The defendant is indebted to the complainant for goods, wares and merchandise heretofore sold and delivered by
4 the complainant to the defendant in the sum of Six Thousand One Hundred seventy six dollars and forty three cents ($6176.43), no part of which has been paid, and there are no offsets or counter-claims thereto.

4. The ground upon which the jurisdiction of the court depends in this suit is the diversity of citizenship of the complainant and of the defendant, and the amount in controversy herein exceeds the sum or value of $3000., exclusive of interest, costs and expenses. This suit is brought for the purpose of enforcing the claim of the complainant against the defendant, the determination of the claims of the creditors of the defendant, marshalling of the assets of said company, the sale and distribution of said assets among its creditors, the appointment of a receiver for the conservation and protection of said assets, and for the other relief hereinafter set forth.

5. The defendant, Daniel Boone Woolen Mills, Inc., is engaged in the manufacture and sale of woolen cloth and men's clothing, with manufacturing plants located in the City of Chicago, Illinois, the city of Rock Island, Illinois, the city of Moline, Illinois, the city of East Moline, Illinois, the city of Davenport, Iowa, and the City of Baltic, Connecticut; that the defendant corporation has an authorized capital of 250,000 shares of the par value of $25.00, and that there are now issued and outstanding 187,500 shares of said capital stock; that the stock of the defendant is widely held in the hands of approximately 1500 individual stockholders residing in many states of the United States.

6. That as of December 31, 1924, as appears from the balance sheet of said corporation prepared by certified public accountants, said defendant corporation had current assets,
consisting of cash, notes and accounts receivable, raw
5 materials, goods of process, and finished garments, of the value of $1,036,076.39 and current liabilities, consist-

ing of notes and accounts payable, accrued payroll, taxes and reserves for unadjusted claims, amounting to the sum of $222,446.19; that as of the 31st of December, 1924, the defendant had fixed assets, consisting of lands, factory buildings, machinery and equipment of the total value, as carried on the company's books, of $1,664,063.41; that the plant of the defendant at Baltic, Connecticut, is encumbered by a mortgage in the sum of $125,000, and the plant of the defendant at Chicago, Illinois, is incumbered by a mortgage in the sum of $287,500.00, or a total mortgage indebtedness of $412,500.00; that the assets of the defendant exceed its liabilities by more than $1,500,000, and said corporation is solvent.

7. That during the fiscal year ending December 31, 1924, as appears from the books of said corporation, the defendant sustained an operating loss not in excess of $1,000,000; that as of December 31, 1923, the defendant had a surplus, as shown by its books, of approximately $500,000, which as of December 31, 1924, had been turned into a deficit of $2,678,496.50.

8. That prior to the 14th of November, 1924, the forces of the defendant were managed and controlled by Oscar Gumbinski, President and Director, Herman Gumbinski, Treasurer and Director, and D. M. Zemans, Secretary and Director; that because of the critical financial condition of the company, the said Oscar Gumbinski and Herman Gumbinski resigned as officers and directors of said company on or about the 14th day of November, 1924, and turned over the management of said company to Joseph Ryfield, as President and Frank Solomon, as Vice President; that the pursuant officers of the defendant have used every effort to secure financial aid for the company, and pay all of its maturing debts and obligations and to obtain a sufficient working capital to enable the company to continue its operations; that despite their best efforts on that behalf, the defendant has been unable to secure any financial support and is now unable to meet its maturing obligations, despite the fact that the corporation has physical assets worth large sums, the total amount of all of its liabilities; that $12,500.00 of the principal of said mortgage for $287,500, covering the Chicago plant of the defendant, and $9000 interest thereon, became due upon the first day of February, 1925, and the defendant has been unable to pay the same or any part thereof, and will be unable to pay same, and is in danger of having the entire principal amount of said mortgage and the interest thereon declared immediately due

and payable, and foreclosure proceedings instituted on said mortgage; that the defendant owes Marshall and Ilsley Bank of Milwaukee, Wisconsin, the principal sum of $20,000, upon the demand note of the company, payment for which has been demanded by said bank and defendant is unable to pay the same; that defendant owes the Peoples Savings Bank of Moline, Illinois, the sum of $10,000.00 upon the company's promissory note, which matured January 30, 1925, which accounts the defendant has been and now is wholly unable to pay; that the complainant is advised and believes, and on such information and belief states the fact to be, that there are outstanding other promissory notes of the defendant, aggregating $100,000.00, $75,000.00 of which have matured and have been protested for non-payment, and suit is about to be brought against the defendant thereon.

9. That the defendant owes approximately $4500 to the United States Government on its capital stock tax for the year 1924, which tax was due and payable in September, 1924; that the Collector of Internal Revenue for the Illinois District has issued a warrant for the collection of said tax and said warrant is now in the hands of deputy collectors for collection, and said deputy collectors have threatened to seize the property of the Daniel Boone Woolen Mills, Inc., for the satisfaction of said tax, unless said tax is promptly paid; that the United States Government has a claim against the defendant for a portion of defendant's income tax for the year 1923, aggregating in excess of $30,000.00, that the defendant has given a surety bond to insure the ultimate payment of this tax, but the surety company has served notice on the defendant that it is about to withdraw as surety upon said bond, and complainant is advised that upon such withdrawal the Collector of Internal Revenue will issue a warrant to enforce the collection of said tax and will seize the property of the defendant in satisfaction thereof.

10. That an attachment suit has been brought in the State of New York against the defendant for a claim aggregating $25,000.00, and property of the defendant in that state attached, and other attachment suits are threatened and may be brought in the various states in which the corporation has property; that on or about the 2nd day of February, 1925, judgment was rendered against the defendant in the Municipal Court of Chicago, for the sum of $932.56; that this judgment has not been paid and is now a lien upon the property of the defendant located in the County of Cook and State of

Illinois, which property will be subject to sale upon execution; that the defendant is wholly without funds with which to pay any of the foregoing obligations, and has no means of obtaining funds with which to meet said obligations, except by the completion of its products now in the course of manufacture and shipment of the same; that the defendant has only approximately $6000. cash on hand and more than that amount is required to meet its payrolls for the week ending February 20, 1925, and unless relief herein prayed for is granted, defendant will be obliged to suspend business.

11. That the defendant corporation now has orders on hand in excess of $400,000.00 and complainant is advised and believes, and on said information and belief states the fact to be, that unless said orders can be completed and said merchandise delivered, the value of the work in process, together with the labor heretofore expended on said work, will be rendered practically valueless and a very substantial loss will result to the defendant and to its creditors.

12. That the defendant has been engaged in the manufacturing and marketing of its products since the year 1919 and has built up a substantial good will for its merchandise, all of which will be wholly lost if the business of the defendant is disrupted, its assets seized by creditors to satisfy numerous claims against defendant and which are now due and unpaid, and to enforce which, action has now been taken or is about to be taken by the company's creditors; that a large element of the value of the property of the defendant is the value of said property as a going concern, which value will be wholly lost if the defendant is compelled to suspend its business or its creditors are permitted to obtain judgments at law, and to obtain satisfaction of said judgments in the usual course and in the manner prescribed by law.

13. That unless the court takes jurisdiction of this cause for the protection of every interest in the property and the assets of the defendant, individual creditors will immediately assert their rights and remedies in different courts, the result will be a multiplicity of suits and a race of diligence. Attempts will be made to secure judgments and priorities, attachments and levies will be made upon the materials and supplies indispensable to the operation of the business of the defendant, and will greatly interfere with and ultimately prevent the defendant from continuing the operation of said property, and the value of the property of the defendant as a going concern will be largely dissipated and

lost, and the mortgages covering the plants of the defendant will be foreclosed; all to the great loss and damage of the complainant and of the creditors of the defendant.

14. That an attempt by the complainant to enforce its claim as a general creditor would participate immediate action on the part of the other creditors of the defendant, and would in turn lead to a wasteful strife, controversy and a general welter of attachments, executions and separate creditors bills, resulting in the assets of the defendant being insufficient to satisfy all creditors; all of which the complainant believes can be avoided and the property preserved for equitable distribution among those entitled thereto only by the interference of a court of equity and the granting of equitable relief for the preservation of all of the property of the defendant as a going concern, by enjoining all creditors from interfering with or attempting to obtain any priorities in the property and assets of the defendant, and thus permitting a sale of all of said assets for the benefit of all of the defendant's creditors.

15. It is imperatively necessary for the preservation of the property, assets and business of the defendant, and the protection of the interests of all concerned, that a receiver be forthwith appointed by this Court to take charge of the same, and to operate the business of the defendant as a going concern, under the orders and directions of this Court, in order to avoid undue preference by some of the creditors of the defendant and prevent a multiplicity of suits by the various creditors of the defendant, and to prevent irreparable loss and injury to the plaintiff and to the other creditors and the stockholders of the defendant, and thus to continue to carry on the business of the defendant as a going concern, under such terms and conditions as the court may deem advisable, to the end that the assets of the defendant may be conserved and marshalled and the interests of all persons thereon may be definitely ascertained and established, and the interests of the complainant and others in like situation and circumstances may be protected.

Wherefore, Complainant Prays:

First: That the complainant be permitted to file this, its bill of complaint, for the benefit of itself and of all other creditors of the defendant, Daniel Boone Woolen Mills, Inc., who may chose, either by acquiescence or by intervention to become parties hereto and to take the benefit thereof.

Second: That a receiver or receivers be forthwith appointed to take charge of and manage the assets, property and business of the defendant until the further order of this court.

Third: That said receiver or receivers be authorized and empowered to take possession of the plants, property, assets and business of the defendant corporation within its jurisdiction, and to operate the said plants and conduct the said business, and to purchase such new materials and employ such agents, servants, workmen and attorneys as may be necessary from time to time, for the conduct of said business, until the further order of this court.

11 Fourth: That the said receiver or receivers so appointed be authorized to demand, sue for, collect, receive and take into possession all the goods, chattels, rights, credits, moneys, effects, lands, tenements, books, papers, choses in action, and all other property and assets of said defendant corporation within the jurisdiction of this court, and to institute and prosecute suits at law or in equity for the recovery of any assets, property or demands belonging to or existing in favor of the said defendant.

Fifth: That this court may order, direct and decree that all of the property and assets of every name and nature, both legal and equitable, belonging to said defendant and within the jurisdiction of this court, be held and declared to be a trust fund to be held and administered for the benefit of the plaintiff and the other creditors and stockholders of said defendant, and that the assets of said defendant may be ascertained, marshalled and administered and the rights, interests and equities of all creditors, shareholders and others in respect therein be ascertained and adjudged.

Sixth: That at such time as may be found just and proper, the property and assets of the defendant may be ordered sold, as an entirety or otherwise, in such manner and on such terms and conditions as this court shall deem just and equitable, and that any such order or sale shall make proper and suitable provision for the preservation of all equities, rights, priorities, claims and liens of the creditors of the defendant, and shall provide for the sale of the property and assets of the defendant, subject to or free and clear from any and all liens and incumbrances, in total or in part, in such man-

12 ner and upon such terms as this court may direct, and that the proceeds of any such sale be distributed among those entitled thereto as this court shall determine, and that

the complainant may have such other and further relief in the premises as this court may deem just and proper, and as may be necessary fully to protect and enforce the rights and equities of the complainant and of all other creditors of the defendant.

Seventh: That temporarily, and pending this suit, and injunction may be issued restraining and enjoining all persons from levying executions, attaching, intermedling with, or taking possession of any of the property of said defendant.

Eighth: That the complainant herein, or the receivers or receivers who may be appointed herein, may be permitted to apply to any other court of the United States or to any state court of competent jurisdiction, for such order or orders in the premises as may be necessary in aid of the jurisdiction of this court, and the proper management and administration of the said property of the defendant by the said receiver or receivers and of the control by this court of the property of the defendant, and as may be proper in order to protect and preserve the same and the rights and interests of the complainant and others having like interests.

Ninth: That the complainant may have such other and further relief in the premises as the nature of the case may require and as may be agreeable to equity.

Tenth: That a writ of subpoena may be granted to the complainant, to be directed to the defendant, Daniel Boone Woolen Mills, Inc., requiring the said defendant personally to be and appear on a day fixed before this court, and then and there fully, true, direct and perfect answer make to
13 all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and further to perform and abide by such orders, directions and decrees as to the court shall seem meet.

UNITED STATES WORSTED SALES COMPANY
By FRED PHILIPSON
Its duly authorized agent.
GREENSFELDER & GRAND
NEWMAN, POPPENHUSEN, STERN & JOHNSTON
Attorneys for complainant.

United States of America
Northern District of Ill. } ss.
Eastern Division

FRED PHILIPSON, being duly sworn, deposes and says that he is the duly authorized agent of the complainant located at Chicago, Illinois, and duly authorized to sign and verify the foregoing bill of complainant on its behalf; that he has read the said bill of complaint and knows the contents thereof, and that the same is true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes the same to be true.

(Sgd) FRED PHILIPSON

Subscribed and sworn to before me this 18th day of February, A. D. 1925.

MARY FAE PETRIE
Notary Public.

(Endorsed) Filed Feb 19 1925 John H. R. Jamar Clerk.

14 And on, to-wit, the 19th day of February, 1925, came the Defendant, by its attorneys, and filed in the office of the clerk of said court its certain Answer in words and figures as follows, to-wit:

15 UNITED STATES OF AMERICA Filed 192

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

U. S. Worsted Sales Co., a Corporation
Complainant
—*vs*—
Daniel Boone Woolen Mills, Inc., a Corporation,
Defendant
} No. 4660.

ANSWER.

To: The Honorable Judges of Said Court:

The defendant, Daniel Boone Woolen Mills, Inc. appears in the above entitled cause and for answer to the bill of complaint therein says:

That it admits the truth of the statements and allegations therein contained and consents to the appointment of a Receiver and the granting of further relief, as therein prayer, and joins in the prayers therein contained.

DANIEL BOONE WOOLEN MILLS, INC.
By JOSEPH BYFIELD
President

GEORGE F. BARRETT
CHAS. V. BARRETT
LEONARD L. COWAN
Solicitors for Defendant.

(Endorsed) Filed Feb 19 1925 John H. R. Jamar Clerk.

16 And on the same day, to wit, the 19th day of February, 1925, this matter coming on to be heard, the following order was entered by the Court:

Feb. 17 IN THE DISTRICT COURT OF THE UNITED STATES

For the Nothern District of Illinois

Eastern Division.

Thursday, February 19, A. D. 1925.

Present: Honorable James H. Wilkerson, District Judge.

United States Worsted Sales Company, a corporation, *Plaintiff* vs. Daniel Boone Woolen Mills, Inc, a corporation, *Defendant* } Equity No. 4660.

ORDER APPOINTING RECEIVER.

This matter having come on to be heard on the sworn bill of complaint herein and the answer of the defendant hereto admitting the allegations of said bill for the appointment of a receiver for the defendant, Daniel Boone Woolen Mills, Inc., the court having considered said bill of complaint and said answer, and having heard the argument of counsel, and being now fully advised in the premises, it is Ordered, Adjudged and Decreed:

1. That Edward J. Brundage of Chicago, Illinois be and he is hereby appointed receiver of the defendant, Daniel Boone Woolen Mills, Inc., and of all and singular the lands, factories, property, assets, rights, rights of action and choses in action of said Daniel Boone Woolen Mills, Inc., including all buildings, merchandise, completed and in course of manufacture, and including all property and assets, real, personal and mixed, of whatsoever kind and description and wheresoever situated, owned or leased by said Daniel Boone Woolen Mills, Inc., or in which said Daniel Boone Woolen Mills, Inc., has any right, title or interest whatsoever, and including all tools, machinery, furniture, fixtures, materials and supplies, and all books, accounts, records and other books and papers, cash in bank, and all other moneys, things in action, credits,

stocks, bonds, credits, deeds, leases, contracts, muniments
18 or title, bills receivable, accounts receivable, rents, and profits, and incoming, accruing and to accrue, as well as all leasehold interests and other contracts, and all rights, interests and privileges of said Daniel Boone Woolen Mills, Inc., and all assets of said Daniel Boone Woolen Mills, Inc., of every kind and description.

2. That said Receiver be and he is hereby authorized and directed immediately to take possession of all and singular the assets, rights and property, of every kind, nature and description, of said Daniel Boone Woolen Mills, Inc., and to run and manage and operate the business of said Daniel Boone Woolen Mills, Inc., and to use, manage and conduct said business in such manner as, in the judgment of said receiver, will produce the best results, and to employ and discharge such of the officers, directors, managers, superintendents, agents and employes of said Daniel Boone Woolen Mills, Inc., as said Receiver shall deem proper, to keep such property insured to such extent as said Receiver may deem feasable, to collect all outstanding accounts, things in action or credits due or owing to said Daniel Boone Woolen Mills, Inc., and to hold and retain the net revenues thereof in such manner and to the end that the same may be applied under and pursuant to the order of this court.

3. That such Receiver shall have full power to demand, sue for, collect, receive and take possession of all goods, chattels, rights, credits, moneys, effects, lands, tenements, books, papers, choses in action, bills, goods, and property of every description of the said defendant, and to institue suits at law or in equity for the recovery of any asset, property, attempts or demands existing in favor of the said defendant, and,
19 in the discretion of said receiver, to compound and settle with any debtor of the said defendant and with persons having possession of its property or in any way responsible at law or in equity to the defendant corporation, upon such directions and in such manner as said Receiver shall deem just and beneficial to the defendant corporation.

4. That said Receiver is further authorized, from moneys received by him from time to time from any source, to make proper payments, in his discretion, of current and unpaid payrolls, also of all bills for materials and supplies incurred in the ordinary operation of the plants of said defendant corporation from time to time, also to pay the expenses of maintaining and operating the said plants and properties from

and after this date, and all expenses of protecting the rights and titles of said defendant corporation and prosecuting and defending suits, also to pay any taxes and assessments levied upon said property and assets, or any thereof, which, in the judgment of said Receiver, it is necessary to pay, and if needful in his judgment, in order to comply with the directions herein in whole or in part, to borrow money and issue Receiver's Certificates therein upon said terms as the court may by order hereafter approve and direct.

5. That said Daniel Boone Woolen Mills, Inc., and the officers, directors, agents, attorneys and employes of said Daniel Boone Woolen Mills, Inc., and all other persons claiming to act by virtue of or under it, and all other persons, firms and corporations whatsoever and wheresoever situated, located or domiciled, be and they are hereby restrained and enjoined from interfering with, attaching, levying upon or in any manner whatsoever disturbing any operation of the property and premises for which said Receiver is hereby appointed, or from taking possession of or in any way interfering with the same, or any part thereof, or from interfering in any manner to prevent the discharge by said Receiver of the duties of his said office or the operation of said business and properties under the order of the court.

6. That said Receiver shall retain possession of and continue to discharge the duties and trusts aforesaid until the further order of this court, and from time to time make report of his doings in the premises, and may from time to time apply to this court for such further orders and directions as may be deemed necessary and requisite to the due administration of said trust.

7. That said receiver shall qualify as such Receiver by giving bond in the penal sum of One hundred thousand dollars ($100,000.00) reciting his appointment as Receiver herein, and a conditional upon his well and truly performing the duties of his office as Receiver and duly accounting for all moneys and properties that may come into his hands, and abiding by and performing all things that he may be directed to do by this court, said bond to be approved by this court.

8. The said Receiver is hereby authorized to employ counsel, certified accountants, and such other agents and employes as may be deemed requisite and necessary for the proper carrying out of the duties and obligations herein imposed.

Dated, Chicago, Illinois, February 19th, 1925.

JAMES H. WILKERSON
Judge.

21 And on the same day, to-wit: the 19th day of February, 1925, this matter coming on to be heard, the following order was entered by the Court:

22 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

Thursday, February 19, A. D. 1925.

Present: Honorable James H. Wilkerson, District Judge.

United States Worsted Sales Co., a Corporation, *Complainant*, *vs.* Daniel Boone Woolen Mills, Inc., a Corporation, *Defendant*. } In Equity No. 4660.

ORDER APPROVING BOND OF RECEIVER.

An order having been duly granted and entered herein on the 19th day of February, A. D. 1925, appointing Edward J. Brundage, receiver of the defendant Daniel Boone Woolen Mills, Inc., a Corporation, and it appearing to the court that the said Edward J. Brundage has duly given his joint bond with the Standard Accidental Insurance Company, in the amount fixed by the said order,—to-wit, the sum of $100,000.00, and the said bond having been duly filed,

Now, on motion of Ralph F. Potter, attorney for the receiver herein, it is hereby

Ordered, that the said bond be and the same hereby is approved both as to form and as to the sufficiency of the surety.

Enter Feb. 19 1925

JAMES H. WILKERSON
District Judge

13. 23 And on, to-wit, the 13th day of March, 1925, came Union Bank of Chicago, a corp. and Daniel V. Harkin, as Receivers, by their attorneys, and filed in the office of the clerk of said court their certain Motion and Petition in words and figures as follows, to-wit:

24 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

(Stamped): Received Mar 25 1925.

United States Worsted Sales Company, a corporation, *Complainant* vs. Daniel Boone Woolen Mills, Inc., a corporation, *Defendant.*	In Chancery. No. 4660.

To the Honorable the Judges of Said Court, in Chancery Sitting:

Now come the Union Bank of Chicago, a corporation, and Daniel V. Harkin, as receivers of the property and estate of the said Daniel Boone Woolen Mills, Inc., under order of the Superior Court of Cook County, Illinois, in Chancery, entered by said last mentioned Court on February 28, 1925 (hereinafter for convenience referred to as "State Court Receivers"), and move and pray the Court:

For an order on the receiver in the above entitled cause, Edward J. Brundage, Esq. (hereinafter for convenience referred to as "Federal Court Receiver") to turn over and surrender to said State Court Receivers the property, assets, books and records of said Daniel Boone Woolen Mills, Inc., now in the possession, or under the control of said Federal Court Receiver; and

For leave to substitute said State Court Receivers' attorneys, Messrs. Blum, Blum & DeLaney, as solicitors in the above entitled cause for said Daniel Boone Woolen Mills, Inc.,

to the end that said State Court Receivers may and shall control and dictate the acts and doings of said Daniel Boone Woolen Mills, Inc., as defendant in the above entitled cause.

In support of the foregoing, said State Court Receivers show to the Court that heretofore on February 14, 1925, at the City of Chicago, Cook County, Illinois, one Harry Hurwitz, a stockholder of said Daniel Boone Woolen Mills, Inc., duly filed in the Superior Court of Cook County, Illinois, sitting in Chancery, said Hurwitz' original bill of complaint in his own behalf, and that of all other stockholders of said
25 last mentioned company similarly situated against said Daniel Boone Woolen Mills, Inc., which last mentioned bill of complaint was in form and nature what is commonly known as minority stockholder's bill, and charged among other things, various and sundry frauds upon the said Daniel Boone Woolen Mills, Inc., by former officers and directors of said last mentioned company, and the refusal of the present officers and directors of said company to take proper action or institute proper proceedings to recover from such prior officers and directors money and properties of said last mentioned company by said prior officers and directors fraudulently taken and diverted from said last mentioned company, and also charge that the present officers and directors of said last mentioned company had virtually abandoned, or were about to abandon, said Daniel Boone Woolen Mills, Inc., and would, unless restrained by said last mentioned Court, create some improvident lien or encumbrance upon the properties of said last mentioned company, and involve said last mentioned company in disadvantageous, damaging and disastrous litigation or proceedings. Said last mentioned bill of complaint duly prayed for process of summons against said Daniel Boone Woolen Mills, Inc., for general relief in equity, and for the appointment of a receiver pendente lite of the assets of said Daniel Boone Woolen Mills, Inc.

Upon the filing of said bill of complaint by said Hurwitz, a notice was prepared at the instance of said last mentioned complainant, and served upon said defendant corporation, the Daniel Boone Woolen Mills, Inc., that on Monday, the 15th day of February, 1925, at the hour of ten o'clock A. M., or as soon thereafter as counsel could be heard, said Hurwitz' solicitors would appear before the Honorable Oscar Hebel, Judge of said Court, in the room usually occupied by him as a court room, and present the said original sworn bill of

complaint, theretofore filed, and move the Court to ap-
26 point a temporary Receiver to take charge of the assets of said Daniel Boone Woolen Mills, Inc., and also ask for certain injunctional relief, at which time and place the said Daniel Boone Woolen Mills, Inc., might appear if it saw fit. Upon Monday, the 16th day of February, 1925, pursuant to said last mentioned notice, the solicitors for said complainant, Harry Hurwitz, Messrs. Gesas and Leonard, appeared for the said last mentioned complainant, before said the Honorable Oscar Hebel, one of the Judges of said Court, at the hour named, and in pursuance to said notice, and Mr. Leonard Cowen, a duly licensed attorney and member of the Bar of the State of Illinois, of the law firm of Barrett and Barrett, appeared for said defendant, the Daniel Boone Woolen Mills, Inc. Said Gesas thereupon entered said Hurwitz' said motion, stating that said notice had been served upon the said last mentioned defendant corporation, and that said attorney Cowan had advised him, the said Gesas, that said last mentioned company desired a continuance, whereupon said Leonard Cowan stated to the Court that without going into the merits of the bill, whether or not the allegations thereof would warrant the Court in appointing a receiver, there were certain important matters then pending before the Board of Directors of said last mentioned company, which involved some very large amounts of financing, and which would be seriously interfered with, if the court undertook to hear said Hurwitz' said application for a receiver at that time, and that those negotiations would be concluded within a week, and the rights of the complainant under his bill would not be affected in any way at all by allowing said application to go over for the matter of one week or ten days. Said Mr. Gesas thereupon advised the court that if any continuance was granted, it must be upon the condition that the status quo be preserved, and that in the meanwhile he should be
27 served with copies of any counter affidavits. Thereupon the court said that the status quo should be preserved, and of course and papers of opposing counsel would be served upon complainant's solicitors, and that with that understanding, the matter would stand continued to the opening of court in the forenoon of Saturady, February, 21, 1925, without further notice, to which said Leonard Cowan then and there assented. Thereupon, by order, said court entered said last mentioned motion of said Hurwitz and continued the same to

February 21, 1925, and the parties and their counsel left the court room.

Notwithstanding the occurrences of February 14, 1925 and February 16, 1925 as above set forth, on February 18, 1925, the above entitled suit was commenced in this, the United States District Court, for the Northern District of Illinois, Eastern Division, and on the same day, notice was served by said United States Worsted Sales Co. upon said Daniel Boone Woolen Mills, Inc., that application would be made to said United States District Court on February 19, 1925 for the appointment of a receiver of the assets of said last mentioned defendant corporation within the jurisdiction of said last mentioned court, and on February 19, 1925, said Daniel Boone Woolen Mills, Inc., by Joseph Byfield, its President, and said Cowan and said Barrett and Barrett, in this, the District Court of the United States, and admitted in writing the allegations of said last mentioned bill of complaint, and consented to the appointment forthwith by this Court, of a receiver of all of the assets of said Daniel Boone Woolen Mills, Inc., within the territorial jurisdiction of said last mentioned court, and thereupon, upon motion in form and terms of said United States Worsted Sales Co., and in reliance upon
28 said last mentioned consent thereto, this court on said last mentioned date, appointed said Federal Court Receiver herein.

As said State Court Receivers are informed and believe, and therefore charge the fact to be, said Daniel Boone Woolen Mills, Inc., voluntarily furnished said United States Worsted Sales Co., in advance of the filing of said last mentioned bill of complaint, and after the entry and continuance, as aforesaid, of said motion in the Superior Court of Cook County, Illinois, for the appointment of a receiver, the facts, or substantially all of the facts alleged in said bill of complaint in said United States District Court, and thereby, and otherwise, in ways and by means unknown to said State Court Receivers, brought about the filing of said last mentioned bill, and thereafter voluntarily appeared as aforesaid, in said United States District Court, by its President, Joseph Byfield, and said Cowan and said Barrett and Barrett (all of whom signed said written admission of facts), and consented, as aforesaid, to the appointment of such receiver, as aforesaid, by said United States District Court for the purpose, and with the intention of thereby defeating, avoiding and evading

the jurisdiction of said Superior Court of Cook County, Illinois, and thereby depriving the complainant in said original bill in the said Superior Court and others in the same class, of all remedy in the premises and to this end, none of the parties to said case and proceeding in said United States District Court gave any notice of said case or proceedings in said last mentioned court to said Harry Hurwitz, or to said Michael Gesas.

29 As stated in the bill of complaint in said United States District Court and admitted as aforesaid by said Daniel Boone Woolen Mills, Inc., the assets of said last mentioned company exceed its liabilities by upwards of One Million Five Hundred Thousand Dollars ($1,500,000.00), and other than long maturity real estate mortgages on certain of its plants its present outstanding debts (other than liabilities to stockholders) do not exceed, so said State Court Receivers are informed and believe, and so state the fact to be, $150,000.00.

30 Said motion of said Hurwitz in said Superior Court for the appointment of a receiver entered as aforesaid on February 16, 1925 was on said last mentioned date duly entered and continued by said Superior Court to February 21, 1925, and on said last mentioned date by said last mentioned court again duly continued to February 25, 1925, on which last mentioned date one Max Goldenberg, a stockholder of said Daniel Boone Woolen Mills, Inc. by leave of said Superior Court filed his intervening petition and supplemental bill of complaint in said court in said Superior Court, which supplemental bill of complaint was thereupon on said last mentioned date adopted by said Hurwitz as an amendment and supplement to the original bill of complaint of said Hurwitz, and on said last mentioned date and from time to time thereafter until February 28, 1925 said motion of said Hurwitz entered February 16, 1925 as aforesaid was duly continued by said Superior Court, and on February 28, 1925 at Chicago in said cause in said Superior Court, said Superior Court sitting in chancery duly entered its order appointing said State Court Receivers, receivers of said Daniel Boone Woolen Mills, Inc., a certified copy of which last mentioned order of February 28, 1925 is hereto attached marked "Exhibit A", and by reference made a part hereof.

In and by said last mentioned order of February 28, 1925 said Superior Court found, and the fact is, that it had jurisdiction of the subject matter of said suit in said Superior

Court, and of the parties thereto including said Daniel Boone Woolen Mills, Inc., empowered said State Court Receiv-
31 ers to prosecute and defend without further order of said last mentioned court, all existing actions by or against said Daniel Boone Woolen Mills, Inc., and enjoined said last mentioned company, its officers, and directors from in any manner encumbering, pledging or creating any liens or charges whatsoever against the property, moneys, accounts and assets of the said last mentioned corporation during said last mentioned receivership.

Said State Court Receivers show that as they are advised by counsel, and therefore charge the fact to be, by the filing of said bill of complaint in said Superior Court, the appearance therein as aforesaid of said Daniel Boone Woolen Mills, Inc., and the entry as aforesaid on February 16, 1925 of the motion of said Hurwitz for the appointment of a receiver in said Superior Court of Cook County acquired jurisdiction to determine the question of the propriety of the appointment of such receiver and, should it seem fit to said last mentioned court, to appoint a receiver or receivers of said Daniel Boone Woolen Mills, Inc., with the powers and duties conferred upon said State Court Receivers by said order of February 28, 1925; and by reason of the premises said Superior Court of Cook County acquired, on February 16, 1925, constructive possession of all of the assets, property and books of the said Daniel Boone Woolen Mills, Inc., and the prior right and jurisdiction, as against any court proceeding in a cause thereafter instituted to take actual possession of the books, property and accounts of said Daniel Boone Woolen Mills, Inc., by and through the appointment of a receiver or receivers of and for said last mentioned company, its property, assets and books.

Said State Court Receivers Further Show that as they are advised by counsel and believe and therefore charge and
32 respectfully submit, by reason of the premises and on the face of the bill of complaint filed herein in this United States District Court for the Northern District of Illinois, said United States District Court is and was at all times from and after February 16, 1925, without jurisdiction, power or right to appoint a receiver of said Daniel Boone Woolen Mills, Inc., or of any of its property, assets or records.

Wherefore, said State Court Receivers move and pray this court as above.

UNION BANK OF CHICAGO
By GEORGE G. PRESCHERON
Its Trust Officer
DANIEL C. HARKIN
State Court Receivers.

Solicitors for Union Bank of Chicago and Daniel V. Harkin, State Court Receivers.

State of Illinois } ss.
County of Cook }

DANIEL V. HARKIN, affiant, being first duly sworn on oath deposes and says that he is the State Court Receiver of that name above named, and that affiant is duly authorized to make this affidavit on behalf also of said Union Bank of Chicago; that affiant has read the foregoing motion and petition and knows the contents thereof, and that the matters and things therein set forth are true, except those matters therein stated to be upon information and belief or advice of counsel, and that as to all such matters affiant believes the same to be true.

DANIEL V. HARKIN
Affiant

Subscribed and sworn to before me this 13th day of March, A. D. 1925.

F. H. GOLLNER
Notary Public.

(Seal)

(Endorsed) Filed Mar 13 1925 Charles M. Bates Clerk.

(Exhibit A here follows, not copied.)

33 And on, to-wit: the 17th day of March, 1925, this matter coming on to be heard, the following order was entered by the Court:

34 IN THE DISTRICT COURT OF THE UNITED STATES Entered 17.

For the Northern District of Illinois

Eastern Division.

Tuesday, March 17, A. D. 1925.

Present: Honorable James H. Wilkerson, District Judge.

United States Worsted Sales Co., a corporation,
Complainant,
vs.
Daniel Boone Woolen Mills, Inc., a corporation,
Defendant.

In Equity No. 4660

ORDER

It is hereby ordered that all creditors of said defendant, Daniel Boone Woolen Mills, Inc. shall bring in and present to Edward J. Brundage, Receiver, at 720 Westminster Building, Chicago, Illinois, in writing their several claims and demands and make proof thereof upon oath to the satisfaction of the said Receiver within three months from the date of this order and that the claims of any creditors who shall fail to produce and prove their said claims within the time limited in this order shall be barred within the discretion of the court from anticipating in any dividend or distribution of assets of said corporation which may be made by the Receiver.

It is further ordered that the said Receiver shall within ten days from the date of this order cause to be mailed to all creditors of the said defendant whose names and addresses shall be known to him a notice stating the substance of this order and the nature of the proof required and shall also make publication of said notice once each week for two consecutive weeks in a newspaper of general circulation published in the following localities: Chicago, Illinois, Davenport, Iowa and Hartford, Connecticut, said publication and mailing of notice to be commenced within ten days from the date of this order.

Enter:

JAMES H. WILKERSON
Judge.

Mar. 24. 35 And on, to-wit, the 24th day of March, 1925, came Edward J. Brundage, Receiver, by his attorney, and filed in the office of the clerk of said court his certain Answer to Petition of Union Bank, et al. in words and figures as follows, to-wit:

36 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

United Worsted Sales Company, a corporation, *Complainant,* vs. Daniel Boone Woolen Mills, Inc., a corporation, *Defendant.*	In Chancery No. 4660

ANSWER OF EDWARD J. BRUNDAGE, RECEIVER, TO PETITION OF UNION BANK OF CHICAGO, AND DANIEL V. HARKIN.

Now comes Edward J. Brundage, as Receiver of Daniel Boone Woolen Mills, Inc., under order and appointment of this Honorable Court in the above entitled cause, and in answer to the motion or petition of Union Bank of Chicago, a corporation, and Daniel V. Harkin, heretofore filed herein, praying for an order on him, said Edward J. Brundage, Receiver in the above entitled cause, to turn over and surrender to said Union Bank of Chicago and Daniel V. Harkin the property, assets, books and records of said Daniel Boone Woolen Mills, Inc., now in the possession or under the control of said Edward J. Brundage, the Receiver appointed by this court, and for leave to substitute Messrs. Blum, Blum and Delaney, as solicitors in the above entitled cause for Daniel Boone Woolen Mills, Inc., answering says:

37 1. That he is without knowledge whether the matters alleged in the second, third, fifth, seventh and eighth paragraphs of said motion or petition are true.

2. That he admits that the allegations contained in Paragraph Four of said petition are substantially true and further answering says that on the 19th day of February, 1925, he,

the said Edward J. Brundage filed his bond in compliance with the order of this court and took physical possession of all the property of the said Daniel Boone Woolen Mills, Inc. within the jurisdiction of this court; that shortly thereafter upon the petition of the plaintiff herein your respondent and Thomas J. Spellacy were duly appointed ancillary receivers of the said defendant by the United States District Court for the District of Connecticut and said ancillary receivers thereupon took physical possession of all property of the defendant within the jurisdiction of the said last named court; that shortly thereafter A. G. Bush was by the United States District Court for the Southern District of Iowa appointed ancillary receiver of the said defendant and took physical possession of all the property of the defendant within the jurisdiction of said last named court and that he, the said Edward J. Brundage as such Receiver, together with the ancillary receivers herein named are now and have been since prior to the filing of the said petition in possession of all the property of the said defendant so far as they are advised or can ascertain.

3. That he denies that the assets of said defendant, Daniel Boone Woolen Mills, Inc. exceed its liabilities by upwards of $1,500,000 as alleged in Paragraph Six of said peti-
38 tion and admits as therein alleged that the unsecured liquidated indebtedness of said defendant so far as he is advised and believes does not exceed $150,000, but avers that litigation is pending in Chicago, New York and Davenport, Iowa, which may increase the amount of said indebtedness.

4. That he denies that by the filing of said bill of complaint in the said Superior Court of Cook County, the appearance therein of said Daniel Boone Woolen Mills, Inc. and the entry therein on February 16th, 1925 of a motion for the appointment of a receiver by said Court, as alleged in said motion or petition of said Union Bank of Chicago and Daniel V. Harkin, filed herein, or by reason of any of the matters and things alleged and set forth in the said motion or petition, the said Superior Court of Cook County acquired on February 16th, 1925 constructive possession of all the assets, property and books of the said Daniel Boone Woolen Mills, Inc., and the prior right and jurisdiction as against any court thereafter proceeding in a cause thereafter instituted to take actual possession of the books, property and accounts of said Daniel Boone Woolen Mills, Inc., by and through the appointment of a receiver or receivers of and for said Com-

pany, its property and assets and books, as charged and set forth in the Ninth Paragraph of said motion or petition.

5. That he denies that this Court is and was at all times from and after February 16th, 1925, without jurisdiction, power or right to appoint a receiver of said Daniel Boone Woolen Mills, Inc., or of any of its property, assets or records, as charged and set forth in the Tenth Paragraph of said motion or petition, denies that petitioner is entitled to the relief prayed or any part thereof, or any relief, and avers
39 that said petition upon its face is insufficient for the allowance thereof.

Wherefore, Edward J. Brundage, Receiver, as aforesaid, prays that said motion may be disallowed, denied and dismissed.

EDWARD J. BRUNDAGE
Receiver

RALPH F. POTTER
Receiver's Attorney.

(Endorsed) Filed Mar 24 1925 Charles M. Bates Clerk

40 And on, to-wit, the 24th day of March, 1925, came the Complainant, by its attorneys, and filed in the office of the clerk of said court its certain Answer to Petition of Union Bank of Chicago, et al. in words and figures as follows, to-wit:

41 United States of America
Northern District of Illinois } ss.

Filed 192

In the District Court of the United States

For the Northern District of Illinois

Eastern Division.

United States Worsted Sales Co., a corporation,
Complainant,
vs.
Daniel Boone Woolen Mills, Inc.
Defendant.
} In Chancery No. 4660

ANSWER OF UNITED STATES WORSTED SALES COMPANY, A CORPORATION, TO THE PETITION OF UNION BANK OF CHICAGO AND DANIEL V. HARKIN, RECEIVERS.

Now comes United Worsted Sales Co., a corporation, the complainant in the above entitled cause, and in answer to the rule heretofore entered herein, makes answer to the petion of Union Bank of Chicago, a corporation, and Daniel V. Harkin, as Receivers of Daniel Boone Woolen Mills, Inc., appointed by order of the Superior Court of Cook County, Illinois, and says:

1. This respondent admits that on or about the 14th day of February, 1925 one Harry Hurwitz filed a bill of complaint in the Superior Court of Cook County, Illinois, in which bill of complaint said Hurwitz alleged that he was a stockholder of the Daniel Boone Woolen Mills, Inc., holding one hundred shares of its common capital stock; that the officers and
42 directors in charge of the business of the Daniel Boone Woolen Mills, Inc., prior to the 14th day of February, 1924, had mismanaged the business of said corporation, with the result that there had been a large shrinkage in the assets of the corporation between the 31st of December, 1923 and the 2nd of February, 1925; that no steps were being taken by the existing officers of the corporation to receiver the moneys alleged to have been converted by the former officers and directors of the corporation, and praying for the appointment of a receiver to take action on behalf of the cor-

poration to recover the money, assets and property so alleged to have been wrongfully diverted from the corporation; that an accounting be taken of all the acts and doings of the officers and directors of the corporation; that the court direct a meeting of the stockholders of the corporation to be held, of which meeting all of the stockholders should have due notice; that a new Board of Directors be chosen for the corporation, and that the receiver so appointed then turn over to such newly elected officers and directors of the corporation all of the assets marshalled by the Receiver, including such amounts as might be recovered from said former officers and directors, all as more fully appears from the copy of said bill of complaint, which this respondent stands ready to produce and offer in evidence upon the hearing of said petition, in support of this respondent's answer.

2. This respondent has no knowledge or information, except as it is advised by the allegations of said petition, regarding the acts and doings of said Hurwitz and his counsel, and regarding the acts and doings of said Daniel Boone Woolen Mills, Inc. and its counsel, on Monday, the 16th day of February, 1925, as alleged in said petition, and therefore neither admits nor denies said allegations of said petition, but requires said petitioner to make strict proof thereof.

43 3. This respondent admits that on the 18th day of February, 1925 this respondent filed its bill of complaint in the United States District Court for the Northern District of Illinois, Eastern Division, and on the same day served notice upon the Daniel Boone Woolen Mills, Inc. that application would be made to said United States District Court on February 19, 1925 for the appointment of a receiver for the assets of said Daniel Boone Woolen Mills, Inc., and admits that on the 19th day of February, 1925 said Daniel Boone Woolen Mills, Inc., in response to said notice, appeared, by its duly authorized attorneys, and filed answer to said bill of complaint, signed by Joseph Byfield, its President, admitting the allegations of said bill of complaint and consenting to the appointment of a receiver.

4. This respondent denies that the facts alleged in this respondent's bill of complaint were voluntarily furnished to it in advance of the filing of said bill by said Daniel Boone Woolen Mills, Inc., or that said Daniel Boone Woolen Mills, Inc. brought about the filing of said bill of complaint, but avers the fact to be that the facts alleged in said bill of complaint were in the possession of counsel for this respondent

some considerable time prior to the preparation and filing of said bill; that before preparing and filing said bill, the solicitors for this respondent communicated with said Joseph Byfield, President of said Daniel Boone Woolen Mills, Inc., and inquired of him whether or not, if such a bill was prepared and filed, Daniel Boone Woolen Mills, Inc., would admit the allegations thereof, and was advised by said Joseph Byfield that the Daniel Boone Woolen Mills, Inc. would admit the allegations of the bill and would consent to the
44 appointment of a receiver, and this respondent denies that said bill of complaint was filed by this respondent with the intention or for the purpose of defeating, avoiding or evading the jurisdiction of the Superior Court of Cook County, Illinois, or of depriving the complainant in said original bill in the Superior Court of Cook County, Illinois of any remedy which it might have or claim to have in said court.

5. This respondent admits that according to the balance sheet of said corporation, as prepared by certified public accountants, the assets of said Daniel Boone Woolen Mills, Inc. exceed its liability by the sum of $1,500,000; that the actual realizable value of said assets is, as this respondent is advised, and on such information states the fact to be, very much less than the valuation carried upon the books and shown upon said balance sheet; that the debts of said Daniel Boone Woolen Mills, Inc., exclusive of indebtedness secured by mortgage and of notes, the liability of which is disputed, amount to approximately $200,000.

6. This respondent has no knowledge or information, except as it is advised by the allegations of said petition, regarding the action taken by the Superior Court of Cook County, Illinois on the 21st day of February, 1925, the 25th day of February, 1925, and the 28th day of February, 1925, and therefore neither admits nor denies such allegations of the petition, but requires said petitioner to make strict proof thereof.

7. This respondent admits that the order entered by the Superior Court of Cook County on the 28th day of February, 1925 contains in substance the findings and directions as in said petition alleged, but this defendant denies that the Superior Court of Cook County had jurisdiction to enter said order or to appoint said receivers.

45 8. This respondent denies that the Superior Court of Cook County acquired jurisdiction, in and by the fil-

ing of said bill of complaint of Harry Hurwitz on the 16th day of February, 1925 and the motion of said Hurwitz for the appointment of a receiver for said Daniel Boone Woolen Mills, Inc., to determine the propriety of the appointment of a receiver for said company, and denies that by reason of the filing of said bill on the 16th day of February, 1925, and the making of said motion, said Superior Court of Cook County acquired constructive possession of all of the property and assets of said Daniel Boone Woolen Mills, Inc., and denies that said Superior Court of Cook County acquired the prior right and jurisdiction as against any court thereafter proceeding in a cause thereafter instituted, to take actual possession of the books, property and assets of the Daniel Boone Woolen Mills, Inc., but this respondent avers that it is advised by counsel, and so states the fact to be that said bill of complaint filed by Harry Hurwitz in the Superior Court of Cook County on the 16th day of February 1925 did not confer jurisdiction upon the Superior Court of Cook County to appoint a receiver for the Daniel Boone Woolen Mills, Inc., and even had the Superior Court of Cook County had jurisdiction under said bill to appoint a receiver was not a bill of the kind or character which gave to the Superior Court of Cook County constructive possession of the property and assets of said Daniel Boone Woolen Mills, Inc.

9. This respondent denies that the United States District Court for the Northern District of Illinois, Eastern Division was without jurisdiction, power or right to appoint a receiver for said Daniel Boone Woolen Mills, Inc., or for any of its property, assets or records, but this respondent is informed by counsel, and upon such information avers the fact to be, that the United States District Court for the Northern District of Illinois had full power, right and authority to enter the order herein, appointing a receiver for said Daniel Boone Woolen Mills, Inc.

46

And now having fully answered, this respondent prays that the petition of said Union Bank of Chicago and Daniel V. Harkin, as said Receivers, be dismissed, and the costs of the proceeding taxed against said petitioners.

UNITED STATES WORSTED SALES CO.,
By NEWMAN POPPENHUSEN STERN & JOHNSTON
Its Solicitors

NEWMAN POPPENHUSEN STERN & JOHNSTON
Solicitors for said Respondents.

(Endorsed) Filed Mar 24 1925 Charles M. Bates, Clerk

47 And on, to-wit, the 24th day of March, 1925, came Defendant, by its attorneys, and filed in the office of the clerk of said court its certain Answer to Petition Union Bank of Chicago, et al. in words and figures as follows, to-wit: Filed 1925

48 United States of America
Northern District of Illinois } ss.
Eastern Division

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

United States Worsted Sales Company, a corporation,
Complainant,
vs.
Daniel Boone Woolen Mills, Inc.
Defendant.
} In Chancery No. 4660

ANSWER OF DANIEL BOONE WOOLEN MILLS, INC., DEFENDANT, TO THE PETITION OF UNION BANK OF CHICAGO AND DANIEL V. HARKIN, RECEIVERS.

Now Comes Daniel Boone Woolen Mills, Inc., a corporation, the defendant in the above entitled cause, and in answer to the rule of Court heretofore entered in this cause makes answer to the Petition of Union Bank of Chicago, a corporation, and Daniel V. Harkin, as Receivers of the property and assets of the Daniel Boone Woolen Mills, Inc., under order of the Superior Court of Cook County, Illinois, and states:

1. This defendant admits that on the 14th day of February, 1925, one Harry Hurwitz filed a Bill of Complaint in the Superior Court of Cook County, Illinois, alleging that he was a stockholder of the Daniel Boone Woolen Mills, Inc., and that in said bill the said Harry Hurwitz charged, among other things, various and sundry frauds upon the said Daniel Boone Woolen Mills, Inc., by former officers and
49 directors of said corporation, and further charged that the then officers and directors of said corporation had refused to take action or institute proceedings to recover from

such prior officers and directors moneys and properties of the said Daniel Boone Woolen Mills, Inc., fradulently taken and diverted by such former officers and directors; and that said bill also charged that the then officers and directors of the said corporation had virtually abandoned or were about to abandon the said Daniel Boone Woolen Mills, Inc., and would, unless restrained by said Superior Court of Cook County, create liens and encumbrances upon the properties of said Corporation; and that said Bill of Complaint praved for summons against the said Daniel Boone Woolen Mills, Inc., and for the appointment of a receiver of the assets of said Daniel Boone Woolen Mills, Inc.

2. This Defendant further admits that on or about the 14th day of February, 1925, it was served with a notice that on Monday, the 16th day of February, 1925, at the hour of 10:00 o'clock A. M., counsel for said Hurwitz would appear before the Honorable Oscar Hebel, Judge of said Court, and present such Bill of Complaint and move the court to appoint a receiver for the said Daniel Boone Woolen Mills, Inc.; that on the 16th day of February, 1925, the solicitors for the said Harry Hurwitz appeared before Honorable Oscar Hebel, Judge of said Court, and that Leonard L. Cowan, associated with the firm of George F. Barrett and Charles V. Barrett, solicitors, appeared for this defendant; that thereupon solicitors for the said Hurwitz stated to the court that he was advised by the said solicitor for this defendant that this defendant desired a continuance on said motion because certain important financing matters were then pending which would be seriously interfered with if said court undertook to hear said Hurwitz application for receiver, and that nogotiations would be concluded within a week; that thereupon said court continued said cause to Saturday, February 21st, 1925, without further notice.

3. This defendant further answering states that on the 18th day of February, 1925, this defendant was served with a notice, signed by Newman, Poppenhusen, Stern & Johnston, Attorneys at Law, representing the United States Worsted Sales Company, that on the 19th day of February, 1925, the said United States Worsted Sales Company would file its Bill of Complaint in the United States District Court for the Northern District of Illinois, Eastern Division, and that on said February 19th, 1925, an application would be made to the said United States District Court for the appointment of a receiver for the assets of the said Daniel Boone

Woolen Mills, Inc.; that thereupon solicitors for this defendant appeared before the United States District Court on February 19th, 1925, and it appearing by an inspection of the Bill of Complaint in said cause filed that all of the allegations of said Bill of Complaint were true, and that this defendant could not make denial to the allegations in the said Bill of Complaint, this defendant entered its appearance, filed its answer and consented to the appointment of a receiver for the assets of this defendant in said cause.

4. Further answering this defendant states that it is informed and so states the fact to be that the said bill of complaint filed in the Superior Court of Cook County by the said Harry Hurwitz, did not confer jurisdiction upon the
51 said Superior Court of Cook County to appoint a receiver for this defendant for the reason that the allegations in said Bill of Complaint were not sufficient to confer jurisdiction upon the Superior Court of Cook County to appoint a receiver thereunder, and that even if the Superior Court of Cook County had not granted the continuance of the motion of the said Hurwitz for a receiver on the 16th day of February, 1925, the Superior Court of Cook County could not legally appoint a receiver for the assets of this defendant in such proceeding under the allegations of said Bill of Complaint.

5. Further answering this defendant states that the former officers and directors of this defendant had fraudulently taken and diverted a large portion of the assets of this defendant; that the present officers and directors of this defendant instituted two suits in the Circuit Court of Cook County, Illinois, for accountings against said officers and directors, and that said suits were pending at the time of the filing of the bill of complaint by the said Hurwitz.

6. This defendant further answering denies that the present officers and directors of this defendant had virtually abandoned or were about to abandon this defendant but on the contrary, states that the present officers and directors were then engaged in doing everything in their power to protect and husband the assets of this defendant and to recover for the benefit of this defendant, and the stockholders and creditors, any moneys which may have been legally paid out by this defendant under the administration of its former officers and directors.

7. This defendant further answering, denies that this

defendant had brought about the filing of the bill of com-
52 plaint in this cause, but states the fact to be that the facts set forth in the bill of complaint by the complainant in his cause were obtained by independent investigation of counsel for the complainant in this cause, and this defendant denies that the said bill of complaint in this cause was filed by the United States Worsted Sales Company with the consent of this defendant for the purpose of defeating, avoiding or evading the jurisdiction of the Superior Court of Cook County, Illinois, or of depriving the complainant in said bill in the Superior Court of Cook County of all remedy he may have in the said Superior Court of Cook County.

8. Further answering this defendant states that the assets of this defendant exceers its liabilities by upwards of One Million Five Hundred Thousand Dollars ($1,500,000.00), other than real estate mortgages on certain of its plants, and that its present outstanding liabilities, other than real estate mortgages, are approximately One Hundred Fifty Thousand Dollars ($150,000.00).

9. Further answering this defendant admits that on the 25th day of February, 1925, one Max Goldenberg, by leave of said Superior Court, filed his intervening petition and supplemental bill of complaint in said cause, and that said motion of the said Hurwitz was continued from time to time until February 28th, 1925, at which time the said Superior Court of Cook County entered its order appointing said Union Bank of Chicago and Daniel V. Harkin, Receivers of the property and the estate of the said Daniel Boone Woolen Mills, Inc.

10. This defendant admits that the order of the Superior Court entered on February 28th, 1925, contains in substance
53 the findings and directions as is in Exhibit "A" contained attached to the petition herein, but this defendant states that the Superior Court of Cook County had no jurisdiction to enter said order or to appoint said receivers, and that the said State Court receivers are now acting without authority of law for the reason that inasmuch as the oroginal bill of complaint filed in said cause did not confer jurisdiction upon the Superior Court of Cook County to appoint a receiver, a receiver having been appointe by this court before the filing of the supplemental bill of complaint in said Superior Court, the assets and property of this defendant came under the custody and control of this court, and therefore, the said Superior Court of Cook County had no jurisdiction over the property and assets of this defendant.

And now, having fully answered the petition of the said Union Bank of Chicago and Daniel V. Harkin, as Receivers, this defendant prays that the petition of the said Union Bank of Chicago and Daniel V. Harkin, as Receivers, be dismissed.

DANIEL BOONE WOOLEN MILLS, INC.
By GEORGE F. and CHARLES V. BARRETT
Its Solicitors.

GEORGE F. BARRETT
CHARLES V. BARRETT
Solicitors for Daniel Boone Woolen Mills, Inc. Defendant.

(Endorsed) Filed Mar 24 1925 Charles M. Bates Clerk.

54 And on, to-wit, the 28th day of April, 1925, came David Leibowitz and Jacob Rosenbaum, certain stockholders, by their attorneys, and filed in the office of the clerk of said court their certain Amended Intervening Petition in words and figures as follows, to-wit: Filed 1

55 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois.

Eastern Division.

United States Worsted Sales Company, a Corporation, *Complainant,* vs. Daniel Boone Woolen Mills, Inc., a Corporation, *Defendant.* } In Chancery No. 4600

AMENDED PETITION OF CERTAIN STOCKHOLDERS TO INTERVENE IN THEIR OWN BEHALF AND IN BEHALF OF OTHER STOCKHOLDERS IN THE ABOVE ENTITLED CAUSE.

To the Honorable Judges of the District Court of the United States, in and for the Northern District of Illinois, Eastern Division:

Your petitioners, David Leibowitz and Jacob Rosenbaum, file this Amended Petition in their own behalf and in behalf

of all creditors of the defendant, Daniel Boone Woolen Mills, Inc., similarly situated, who may hereafter join in this petition, and respectfully represent unto your honors as follows:

1. That the said David Leibowitz is a resident of the City of New York, in the State of New York, and is the owner and holder of upwards of One Thousand Dollars ($1,000.00) of the par value of the Common Stock of Daniel Boone Woolen Mills, Inc.; that the said Jacob Rosenbaum is a resident
56 of the City of New York, in the State of New York and is the owner and holder of one thousand (1000) shares of the Common Stock of Daniel Boone Woolen Mills, Inc., for which he paid Thirty Thousand Dollars ($30,000.00) and upwards.

2. Your petitioners further represent that the defendant corporation, Daniel Boone Woolen Mills, Inc., was incorporated on, to wit: September 30, 1919, under the laws of the State of Illinois, and that on said date said corporation became qualified to do business in the State of Illinois, at which time its charter was granted to it, which charter was thereafter duly recorded in the Recorder's Office of Cook County, Illinois; that the purpose for which said Daniel Boone Woolen Mills, Inc., was incorporated was to manufacture woolens and other fabrics; that its principal place of business is in the City of Chicago, Illinois; that it owns and has been operating plants at Moline and Rock Island, Illinois, Davenport, Iowa, Baltic, Connecticut, and Chicago, Illinois.

3. Your petitioners further represent that the authorized capital of said Daniel Boone Woolen Mills, Inc., was at the date of its incorporation, Four Hundred Thousand Dollars ($400,000.00), represented by four thousand (4,000) shares of the Preferred Stock of the par value of One Hundred Dollars ($100.00) per share, and Ten Thousand (10,000) shares of Common Stock of no par value; that such authorized stock was increased on August 16, 1921 to One Million Two Hundred Twenty-five Thousand Dollars ($1,225,000.00), consisting of six thousand (6,000) shares of Preferred Stock at One Hundred Dollars ($100.00) per share and twenty-
57 five thousand (25,000) shares of Common Stock of the par value of Twenty-five Dollars ($25.00) per share; that such authorized capital stock was on May 3, 1922, re-classified and said transfer of stock was cancelled, and in lieu thereof the Common Stock was increased to forty-nine thousand (49,000) shares of the par value of Twenty-five Dollars

($25.00) per share, aggregating One Million Two Hundred Twenty-five Thousand Dollars ($1,225,000), and that such authorized capital stock was further increased on January 29, 1923, to Three Million One Hundred Twenty-five Thousand Dollars ($3,125,000), consisting of one hundred twenty-five thousand (125,000) shares of Common Stock of the par value of Twenty-five Dollars ($25.00) per share, and that such authorized Common Stock was still further increased on November 20, 1923, to Six Million Two Hundred Fifty Thousand Dollars ($6,250,000), consisting of two hundred fifty thousand (250,000) shares of Common Stock of the par value of Twenty-five ($25.00) Dollars per share, of which stock, One Hundred Eighty-seven Thousand Five Hundred (187,500) shares of Common Stock of the aggregate par value of Four Million Two Hundred Eighty-Seven Thousand Five Hundred Dollars ($4,287,500) are now outstanding.

4. Your petitioners further allege that on or about the 14th day of November, A. D. 1924, the then directors and officers in charge of said Daniel Boone Woolen Mills, Inc., resigned upon the complaint and at the request of certain stockholders, and thereupon there were elected the following directors: Joseph Byfield, Frank Solomon, Russell Bonynge, Vallee Appel, David N. Zemans, Stephen S. Stratton and John G. Huntoon; that Joseph Byfield was there-
58 upon elected by said directors as President of said corporation; that Frank Solomon was in like manner elected Vice-President, and David N. Zemans, Secretary; that said corporation has at present no Treasurer.

5. Your petitioners further allege that one Oscar Gumbinsky, now deceased, was President of said Daniel Boone Woolen Mills, Inc., until November 4, 1924, and until August 31, 1921, was the owner of all outstanding stock except one share owned by Robert F. Wallace and one share by David N. Zemans.

6. Your petitioners further represent that prior to the 14th day of November, A. D. 1924, the affairs of said defendant corporation were managed and controlled by Oscar Gumbinsky, President and Director; Herman Gumbinsky, Treasurer and Director; and D. E. Zemans, Secretary and Director; that because of the critical financial condition of the company, as set forth in the original bill of complaint herein, the said Oscar Gumbinsky and Herman Gumbinsky did, on the date last aforesaid, resign as officers and directors of said company, and turned over the management of said

company to Joseph Byfield, as President and Frank Solomon, as Vice-President; that said last mentioned officers thereupon made strenuous efforts to secure financial aid for said company to pay all of its maturing debts and obligations and to obtain sufficient working capital to enable the said company to continue its operations, but that despite their said petition in that behalf the defendant company has been unable to secure any financial support and is unable to meet its
59 maturing obligations; that because of such critical situation the said Joseph Byfield has resigned as President of said company; that the directors thereof have virtually abandoned the same, and that said corporation is left without any responsible person in charge of the same and is drifting to inevitable ruin.

7. Your petitioners further represent that one of the causes of the disastrous and ruinous condition in which the financial affairs of the said defendant company has become involved, has been the internal dissension between the several stockholders and directors of said company, the serious charges and counter charges which have been publicly made by such officers and stockholders against each other and the inevitable loss of public confidence and credit which said corporation has sustained thereby, said situation having grown steadily worse until the said company has been practically abandoned by all of its officers as aforesaid; that on the one hand, it has been charged by certain stockholders that the officers who were in charge until November 14, 1924, had, for a long time prior thereto, so mismanaged the business affairs and assets of the said corporation, that by reason thereof there was a deficit in said assets exceeding Two Million Dollars ($2,000,000); that on the other hand it has been, and is claimed by certain other stockholders that from November 14, 1924 to the date of this litigation, the present officers and directors have not properly or efficiently managed the affairs of the defendant corporation; and your petitioners further show that certain stockholders, to wit, one Harry Hurwitz and one Max Goldenberg, have filed a suit in equity in
60 the Superior Court of Cook County, Illinois, in which bitter complaint is made of the action of the present officers and directors since November 14, 1924, and in which suit it is charged that certain officers had previously withdrawn One Hundred Thousand Dollars ($100,000.) for and on account of an alleged over-payment of the existing debt, and that the present officers instituted an action in defend-

ants' name to recover said sum, but that they were not prosecuting such action; that a certain audit was made of defendants' affairs, and that it is stated on, to wit: January 15, 1925, it showed a deficit of over Two Million Five Hundred Thousand Dollars ($2,500,000) in the financial condition of said company, and that said company's balance sheet on November 31, 1923, showed a surplus of Four Hundred Sixty-seven Thousand Six Hundred Five Dollars and Twenty-nine Cents ($467,605.29), and that on February 2, 1925, showed a deficit of Two Million Six Hundred Seventy-eight Thousand, Four Hundred Ninety-six Dollars and Fifty-nine Cents ($2,678,496.59), or a shrinkage in the assets between the two dates last aforementioned, of Three Million One Hundred Forty-six Thousand One Hundred One Dollars and Eighty-eight Cents ($3,146,101.88), where it is claimed by other stockholders that the shrinkage, if any, of the assets of the defendant corporation was unavoidable and due to business conditions, and that the affairs of the defendant corporation were so involved that it was impossible to operate the company's business on a profitable basis, and within a short time previous hereto the said Joseph Byfield issued a certain letter or bulletin to all the stockholders, which was in part as follows:

61 "We are at the present operating the plants in the collection of accounts, but this cannot continue indefinitely with weekly pay-rolls ranging from Fifteen Thousand to Twenty Thousand Dollars, large outlays in cash for woolens and other materials, rentals, taxes and interest to be paid, immediate action by the stockholders in the matter of financing is imperative."

That it is alleged by said certain stockholders that Oscar Gumbinsky, Nathan Gumbinsky, David N. Zemans, Herman Gumbinsky, Robert F. Wallace and Gumbinsky Bros. Company entered into a conspiracy to manipulate the affairs of the defendant corporation and deceive the public, and it is alleged by other stockholders that Oscar Gumbinsky's administration of the affairs of the defendant corporation was competent, but that the said Joseph Byfield who succeeded him as President and the officers and directors who, with said Byfield, subsequently assumed control of said corporation did not properly administer the affairs of said company.

8. Your petitioners further represent that they are unable to determine the measure of truth or falsity of these various charges and counter charges, but that, regardless of the

truth or falsity thereof, said charges and counter charges and the bitterness and strife which they have engendered among the officers and stockholders of said defendant corporation, has not only resulted in the ruin of the credit and business of said corporation, but has caused the virtual abandonment of said corporation by its president and directors, as aforesaid, and has left said corporation without any authorized or responsible person in charge of its affairs.

9. For a more specific statement of the present financial condition of said defendant company, your petitioners
62 beg to refer to the detailed statements found in the original bill of complaint herein.

10. Your petitioners further represent that since the appointment of a Receiver for said defendant company, by this Honorable Court, a Receiver has also been appointed at the instance and request of certain stockholders of said defendant company by the Superior Court of Cook County, Illinois, and your petitioners further represent that it would be a great hardship and imposition upon the stockholders of said defendant company, that there should be two receivers for the same with resultant conflict of authority and inevitably involving a large and unnecessary duplication of expense; that ancillary receivers for said defendant company have also been appointed in the State of Connecticut and in the State of Ohio; that a State Court is not in position to efficiently deal with or to exercise any control over such ancillary receiverships in other states; but that the United States District Court is far better qualified to control and co-ordinate such ancillary receiverships with a receiver appointed by this court.

Therefore your petitioners pray leave to intervene in their own behalf and in behalf of other stockholders who may desire to become parties hereto and to be made parties complainant in the above entitled cause, and that they may be allowed to prosecute this cause in their own behalf, either with or independently of the present complainant, United States Worsted Sales Company, a corporation, to the end that the dead-lock in the corporation's affairs may be broken;
that the dissensions and disagreements among the officers
63 and stockholders may be reconciled; that the said corporation may be placed under the control of some responsible management; that all charges and counter charges of misconduct or mismanagement on the part of former or present directors, officers and stockholders be fully investigated; that the business of the defendant be continued by the

present receiver appointed by this Honorable Court until the further order of this court; that an accounting may be made under the direction of the court of all acts and procedure of all parties who may be deemed proper by the court; that all stockholders of the defendant corporation be enjoined and restrained from prosecuting any action or actions, whether suits at law or bills in chancery, or any other legal action whatsoever, as stockholders, for any purpose similar to the purpose for which this petition is filed; that the assets and business of the corporation may be conserved for the benefit of the shareholders, as well as the creditors thereof, and that when said business shall have been placed upon a sound financial basis, the management and control thereof may, by order of this Honorable Court, may be returned to the officers and stockholders of said corporation.

May It Please The Court to grant a rule upon all the other parties to this suit to plead, answer or demur to this Amended Intervening Petition, of your petitioners within a short day to be fixed by the court, and that this Amended Petition may be taken as confessed as against those who fail to plead, answer or demur to the same;

And your petitioners will ever pray, etc.

DAVID LIEBOWITZ
JACOB ROSENBAUM

THOS. S. HOGAN
GEORGE F. MULLIGAN
Solicitors

64 State of Illinois } ss.
County of Cook. }

N. L. RUSSELL, being first duly sworn, deposes and says that he is the duly authorized agent in this behalf of the Amended Intervening Petitioners herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to matters and things therein stated to be upon information and belief, and that as to such matters and things he verily believes the same to be true.

N. L. RUSSELL

Subscribed and sworn to before me this 28th day of April, A. D. 1925.

JOSEPH F. SCANNELL
(Seal) *Notary Public*

(Endorsed) Filed Apr 28-1925 Charles M. Bates Clerk

May 1. 65 And on, to-wit, the 1st day of May, 1925, came Union Bank of Chicago and Daniel V. Harkin, Receivers, by their attorneys, and filed in the office of the clerk of said court their certain Motion to Strike Amended Petition in words and figures as follows, to-wit:

66 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

United States Worsted Sales Company, a Corporation, *Complainant,*
vs.
The Daniel Boone Woolen Mills, Inc., a Corporation, *Defendant.*
} In Chancery No. 4660.

MOTION TO STRIKE AMENDED PETITION

Now come Union Bank of Chicago, a corporation, and Daniel V. Harkin, as receivers of said Daniel Boone Woolen Mills, Inc., by appointment of the Superior Court of Cook County, Illinois, and, claiming so to be authorized by said order of appointment of said Superior Court, for and on behalf of said Daniel Boone Woolen Mills, Inc., defendant, and move the court to strike from the files the amended petition heretofore, on April __, 1925, filed in the above entitled cause by David Leibowitz and Jacob Rosenbaum on the following grounds all apparent upon the face of the record herein:

1. On the face of the record herein, this court is without jurisdiction in said Case No. 4660, in chancery, and therefore without jurisdiction to receive or entertain said amended petition of said David Leibowitz and Jacob Rosenbaum.

67 2. Said petitioners, David Leibowitz and Jacob Rosenbaum, have not in and by their said amended petition made or stated such a case as entitles them or either of them to file said petition, or to any recovery or relief from or against said Daniel Boone Woolen Mills, Inc., touching the matters contained in said petition, or any of such matters.

3. The matters and the things alleged, recited or referred

to in said amended petition and the relief therein prayed is not germane to the above entitled cause No. 4660, in chancery.

4. Said petitioners on the face of said amended petition have no possible basis for or a right to appear or be heard in the premises, except it were for and on behalf of said Daniel Boone Woolen Mills, Inc., on the ground of some omission or refusal of said Daniel Boone Woolen Mills, Inc., to seek in its own name and on its own behalf relief to which it was properly entitled in the premises, but so it is no showing of any such right in said petitioners is made in and by said amended petition.

5. The substantive matters referred to or recited in Paragraph numbered 7 of said amended petition are mere conclusions or are not alleged or charged as existing, but, on the contrary, in and by said Paragraph numbered 7 said petitioners merely present that it is or has been alleged, claimed, complained or charged by others that the facts are such and such or so and so, but it nowhere appears in and by said petition that the facts so charged to have been alleged, claimed, complained or charged by others are in fact as by such others so alleged, claimed, complained or charged.

68 6. The mere facts (if such were the facts) as alleged in Paragraph numbered 6 of said last mentioned amended petition and in the first ten and one-half lines of Paragraph numbered 7 of said last mentioned amended petition do not constitute sufficient or legal grounds for the filing of said amended petition or the granting of any relief in the premises to said petitioners.

7. Said petitioners on the face of said amended petition are not creditors of said Daniel Boone Woolen Mills, Inc., are not interested in the subject matter in said Case No. 4660, in chancery, the subject matter of which in the payment of creditors of said Daniel Boone Woolen Mills, Inc., and have no status to file said amended petition or bring suit on behalf of creditors of said Daniel Boone Woolen Mills, Inc.

8. The only way in which it appears, if it does appear, from said amended petition that said petitioners as stockholders of said Daniel Boone Woolen Mills, Inc., have a right to proceed for or on behalf of said Daniel Boone Woolen Mills, Inc., is in the allegations and recitals of said amended petition as to what is claimed and alleged in said suit in said Superior Court of Cook County, Illinois, and if so it be that it thus appears that any stockholders of said Daniel Boone Woolen Mills, Inc., have a right to proceed in the premises

for and on behalf of said Daniel Boone Woolen Mills, Inc., then it necessarily appears that said Superior Court of Cook County, Illinois, has jurisdiction in the premises, from which it follows that there is now pending in said Superior
69 Court of Cook County, Illinois, a proper suit in the premises in which all relief which could be granted upon said amended petition may be granted, and that said Superior Court in exercising its jurisdiction has duly appointed its receivers of the assets of said Daniel Boone Woolen Mills, Inc.

9. If allowed to become parties complainant in said Case No. 4660, said petitioners would necessarily be thereby aligned with a creditor or creditors of said defendant company and would not be proceeding (as alone they could have any right to proceed) for and on behalf of said defendant corporation, but adversely to said defendant corporation.

10. As to the allegations and conclusions in Paragraph numbered 8 in said amended petition, that said corporation has been left "without any authorized or responsible person in charge of its affairs", on the contrary, it appears on the face of said amended petition that this, the District Court of the United States, has appointed a receiver of the affairs and property of said corporation in the interest of creditors, and that said Superior Court of Cook County, Illinois, has appointed receivers of said corporation primarily in the interest of stockholders, and that in said suit in the Superior Court all relief that could on any theory be granted to said petitioners may be secured and granted, and that said suit in said Superior Court constitutes a prior suit pending in the premises.

11. And if so it be (see Paragraph numbered 10 of said amended petition) that it is a hardship and imposition upon stockholders of said defendant corporation that there should be two receivers for said defendant corporation and
70 that that situation involves conflict of authority and charge and unnecessary duplication of expense, the only remedy thereof which can be secured in either of said courts, that is, either in said Federal Court or in said Superior Court, is the discharge by one or the other of said last mentioned courts of its own receiver or receivers, and no relief from said situation can be secured by the continuation of the receivership in this, the Federal Court.

12. The ultimate relief prayed in said amended petition, namely, the return of the management and control of said defendant company to the officers and stockholders of said

corporation cannot on the fact of said petition be granted or effected by this court, since on the face of said petition upon relinquishment of possession and control by this court of said defendant corporation's business and property, the business and property of said defendant corporation must be surrendered to and placed in the hands of the receivers appointed by said Superior Court of Cook County, Illinois.

13. It does not appear on the face of said amended petition that said petitioners have any adjudicated or admitted pecuniary claim against said defendant corporation, or any lien upon any assets of said defendant corporation, or that said petitioners or either of them have exhausted their remedy at law in the premises.

Wherefor, and for divers other reasons apparent on the face of said amended petition said Union Bank of Chicago and Daniel V. Larkin, as receivers as aforesaid, of said Daniel Boone Woolen Mills, Inc., move the court to strike
71 from the files said amended petition of said Leibowitz and Jacob Rosenbaum.

DANIEL V. HARKIN
UNION BANK OF CHICAGO
By HARRY G. KEATS
Its Asst. Trust Officer
Receivers of said Daniel Boone Woolen Mills, Inc., Under order of the Superior Court of Cook County, Illinois.

BLUM, BLUM & DELANEY
Solicitors for Union Bank of Chicago, a Corporation, and Daniel V. Harkin, Receivers of said Daniel Boone Woolen Mills, Inc., under order of the Superior Court of Cook County, Illinois.

(Endorsed) Filed May 1. 1925 Charles M. Bates, Clerk.

72 And, on, to-wit: the 21st day of May, 1925, this matter coming on to be heard, the following order was entered by the Court:

May 73 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

Thursday, May 21, A. D. 1925.

Present: Honorable James H. Wilkerson, District Judge.

United States Worsted Sales Company, a Corporation, *Complainant* vs. Daniel Boone Woolen Mills, Inc., *Defendant*	In Chancery No. 4660

ORDER

On motion of Thomas S. Hogan and George F. Mulligan solicitors it is ordered that leave be and it is hereby give to David Leibowotz and Jacob Rosenbaum to file an interven ing petition as complainants in the above cause.

It is further ordered that the motion of the State Cour Receiver to strike said intervening petition be entered an continued to June 22nd, 1925.

Enter:

J. H. WILKERSON
Judg

76 And afterwards, to wit, on the 9th day of July, 192 being one of the days of the regular July term of sai Court, in the record of proceedings thereof, in said entitle cause, before the Honorable James H. Wilkerson, Distric Judge, appears the following entry, to wit:

77 IN THE DISTRICT COURT OF THE UNITED STATES Enter 1925

Northern District of Illinois

Eastern Division.

Thursday, July 9, A. D. 1925.

Present: Honorable James H. Wilkerson, District Judge.

United States Worsted Sales Company, a Corporation,
vs.
Daniel Boone Woolen Mills, Inc., a Corporation,
} Equity. No. 4660.

This cause coming on to be heard upon motion of State Court Receivers to turn over property in possession of Receiver appointed by this Court, and after arguments of counsel and due deliberation by the Court said motion is overruled and denied, to which ruling of the Court the said Receiver here and now duly excepts.

Whereupon the solicitors for the State Court Receivers enter their motion to be substituted as attorneys for defendant here, which motion is overruled without prejudice to the rights of said attorneys, to be heard upon all matters in which State Court Receivers have an interest.

Whereupon this cause coming on to be further heard upon the motion to strike the intervening petition of Liebowitz and Rosenbaum, after arguments of counsel and due deliberation by the court said motion is overruled and denied.

It Is Further Ordered that the parties to this cause be and they are hereby required to answer same within twenty (20) days from this date.

It Is Further Ordered that the time within which to file Certificate of Evidence be and the same is hereby extended to September 21st, A. D. 1925.

104 And, on, to-wit: the 15th day of September, 1925, there was filed in the office of the Clerk of said Court the following Certificate of Evidence:

of 105 United States of America } ss.
Northern District of Illinois }

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division at Chicago

United States Worsted Sales Company, a Corporation, *Complainant.*
vs.
The Daniel Boone Woolen Mills, Inc., a Corporation, *Defendant.*
} In Equity No. 4660.

STATEMENT AND CERTIFICATE OF EVIDENCE.

On April 20th, 1925, at 10:00 o'clock A. M., this matter came on before the undersigned, the Honorable James H. Wilkerson, one of the judges of said court, sitting in the equity without a jury, upon the motion and petition filed and entered herein on, to-wit: March 13th, 1925, by the Union Bank of Chicago, a corporation, and Daniel V. Harkin, as receivers of the property and estate of said Daniel Boone Woolen Mills, Inc., under order of the Superior Court of Cook County, Illinois, in chancery, entered by said last mentioned court on February 28th, 1925 (hereinafter for convenience referred to as "State Court receivers"), and upon the several answers thereto of said Daniel Boone Woolen Mills, Inc., said United States Worsted Sales Company and Edward J. Brundage, receiver herein under order of this, the United States District Court (hereinafter for convenience referred to as the "Federal Court receiver") for hear-
106 ing and trial upon said pleadings and the evidence to be offered and adduced by the parties, and the following evidence was offered and received and proceedings had:

Mr. Edward R. Johnston, of the law firm of Newman, Poppenhusen, Stern & Johnston, appeared for United States Worsted Sales Co.

Mr. Ralph F. Potter, of the law firm of Cassels, Potter and Bentley, appeared for Edward J. Brundage, Receiver for the United States Court.

Mr. Lloyd C. Whitman, and Mr. John V. DeLaney, of the law firm of Blum, Blum and DeLaney, appeared for the Union Bank of Chicago, and Daniel V. Harkin Receivers for the State Court.

Mr. Leonard L. Cowan, of the law firm of Barrett & Barrett, appeared for the defendant.

Mr. T. S. Hogan, appeared for certain intervening Petitioners.

MR. JOSEPH ROEDER, a witness called by the State Court receivers and a deputy clerk of the Superior Court of Cook County, Illinois, produced certain original orders and pleadings from the files in the office of the Clerk of said Superior Court of Cook County, Illinois, in the case of *Harry Hurwitz* v. *Daniel Boone Woolen Mills, Inc.*, Case No. 415641, in chancery, in said Superior Court. It was stipulated by the parties that the file marks on the same should be sufficient proof of the filing and the entry of the various pleadings and orders, and the same were offered by the State Court receivers and received in evidence as Exhibits 1 to 9, both inclusive. From these exhibits it appears:

Exhibit 6, bill of complaint filed in the State Court February 14th, 1925; Bill of plaint State

(1 and 2) On February 14th, 1925, Harry Hurwitz filed in the Superior Court in Cook County, Illinois, in chancery, 107 in Case No. 415641, entitled in said last mentioned Court, said Hurwitz' sworn bill of complaint against said Daniel Boone Woolen Mills, Inc. The bill of complaint alleges that Hurwitz is a resident of Chicago, Illinois, a stockholder of said Daniel Boone Woolen Mills, Inc., holding 100 shares of common stock of said last mentioned company, for which he paid $3600.00; that the Daniel Boone Woolen Mills, Inc., is a corporation organized under the laws of the State of Illinois, with its principal place of business in the City of Chicago, but also owning and operating plants at Moline and Rock Island, Illinois, Davenport, Iowa, and Baltic, Connecticut; that the complainant brings suit in his own behalf and that all other stockholders and other persons interested; that the defendant company was organized in September, 1919, and by its charter is authorized to engage in the manufacture of woolens and other fabrics;

(3) That as originally incorporated it had a capital stock of $400,000.00, represented by 4,000 shares of preferred stock of the par value of $100.00 per share, and 10,000 shares of

common stock of no par value; that thereafter, on various occasions, the capital stock was increased, the preferred stock cancelled, and that there is now outstanding 187,500 shares of common stock of the par value of $25.00 per share;

(4) That on or about November 14th, 1924, the directors and officers in charge of the company's business were ousted and compelled to resign; that the names of all the present officers and directors are unknown to complainant, but that when they are discovered complainant prays leave to make them parties defendant to the bill; that on November
108 14th, 1924, it was discovered that for a long time prior thereto the company's officers and directors had mismanaged the business affairs and assets of the company, by reason whereof there was a deficit in the company's assets of exceeding $2,000,000.00; that the former officers and directors had caused statements to be made to the Chicago Stock Exchange, the New York Stock Exchange and the Securities Division of the Office of the Secretary of State of Illinois, that the company's stock was intrinsically more valuable than it actually was, and that by means of such misstatements and false representations were enabled to place the shares of stock on sale on the stock exchanges of Chicago and New York, and sell the same to the general public in an aggregate of more than $3,000,000.00;

(5 and 6) That on November 14th, 1924, one Joseph Byfield of Chicago and a number of other persons whose names are at present unknown to the complainant were elected directors of the company; thereupon Byfield was elected president, and he and his associate directors assumed to re-establish the business of the company with a view to operating it for a profit; that shortly after Byfield assumed possession and control as president, and through the board of directors dominated by him, he reported that he had discovered that the former officers and directors of the company, within a short time prior to their resignations, had withdrawn approximately $100,000.00 in pretended payment of a pretendedly existing debt, when in fact no such debt existed, and that he, Byfield, had instituted action against the last named the company in an attempt to recover this $100,000.00; that said Byfield also reported that he had caused an audit to be made of the affairs of the company; that this audit sheet, a
109 copy of which is attached to the bill as Exhibit A, shows a deficit of over $2,500,000.00; that about February 12th, 1925, Mr. Byfield informed the complainant and other stock-

holders, in writing, that the company's balance sheet on December 31st, 1923, showed a surplus of $467,605.29, and that on February 2nd, 1925, the statement showed a deficit of $2,678,496.59, or a shrinkage from December 31st, 1923, to February 2nd, 1925, of $3,146,101.88; that his, said Byfield's, investigation of the affairs of the company revealed conditions much worse than he had imagined, and that the affairs of the defendant corporation were so involved that it was impossible to operate it on a profitable basis; that after ten weeks of almost constant attention to this business—a period of discoveries, griefs and disappointments one after the other—he was compelled to report to the stockholders that his original hope of saving the company appeared well nigh impossible. The discouragement lay in the fact that, seemingly, there was no limit to the involved situation, and that he, said Byfield, was thoroughly convinced that seldom in the history of large American enterprises had a business been so woefully mismanaged and the general public so brazenly deceived; that at that time the plants of the defendant company were being operated from the collection of accounts, but that this could not continue indefinitely, that with weekly payrolls ranging from fifteen to twenty thousand dollars, large outlays in cash for woolens and other materials, rentals, taxes and interest to be paid, immediate action by the stockholders in the mater of financing was imperative;

(7) That no action has been instituted by said Byfield or his associate officers and directors against said former 110 officers and directors, nor any attempt been made to recover the huge sums of money alleged to have been converted by these former officers and directors, nor is there any promise that the present officers contemplate any such procedure; that by reason of said Byfield's and his associate's representations to stockholders of the desperate financial condition of the defendant corporation and that said Byfield and the directors are aware of the wrongful acts and misappropriation stated and charged and have taken no steps on behalf of the defendant corporation to regain any portion of the misappropriated moneys, the only course by which relief could be obtained on behalf of the defendant corporation is the immediate appointment of a receiver with ample power and direction to cause a thorough examination of all the acts and doings of those who have misapplied or misappropriated assets of the defendant corporation and to institute such legal or equitable procedure as may be necessary

to secure a return to the corporation of such misappropriated property or the proceeds thereof;

(8) That one Oscar Gumbinsky, who was one of the former board of directors and officers, before the election of Byfield and his associates, has caused an advertisement to appear in the Chicago papers, copy of which is attached to the bill of complaint as Exhibit B and made a part thereof, making counter-charges against said Byfield and his administration of the affairs of the defendant company destructive of the good will of the company; that by reason of the premises, the appointment of a receiver with authority to repossess and marshal the assets of the company will not jeopardize the business of the company, but, on the contrary, conserve its interests;

111 (9) That some stockholders of the defendant corporation other than the complainant have made attempts to secure action on behalf of the corporation in the premises, and to that end requested the present officers and directors to make a thorough investigation of the affairs of the company and institute proper action on behalf of the company against its former officers and directors and all others who have misappropriated the company's assets, but that the officers and directors have refused to institute such action and have refused to cause such an investigation to determine the truth or the falsity of the charges of conversion and concealment of property and assets of the company in an aggregate of more than $1,000,000.00; that there has been a shrinkage of more than $3,000,000.00 in twelve months last past in the assets of the defendant company, and that no efforts have been made by its officers and directors to investigate the reason, cause or source of the same, or to take any steps whatever toward requiring the return of any such misappropriated assets;

(10) That by reason of the charges and countercharges between the present and former officers it is impossible to procure a fair and impartial investigation of the affairs of the company by corporate action or its officers and directors;

(11) That during the period from November 14th, 1924, when Byfield and his associates took charge of the defendant company, and up to December 31st, 1924, the defendant company sustained a loss of approximately $75,000.00, for which Byfield and his associates alone are responsible; that if the business of the company is continued under the present cha-

otic condition and inefficient management, with the credit
112 of the company already shattered and practically destroyed, and no immediate assistance or protection afforded by the court, the company will become insolvent; that if a receiver is appointed and a proper investigation made by him under the direction of the court, the money the receiver will recover from officers, directors, individuals, and corporations who have fraudulently, unlawfully and unjustly obtained portions of the assets of the company and improperly converted the same for their own use will be sufficient to discharge all liabilities of the company, to rehabilitate its credit and give it ample resources with which its good will will be restored and its financial standing re-established;

(12) That by reason of the failure of the present officers and directors of the company to take proceedings in the premises on their own initiative, and by reason of the enormous sums of money, so misapplied, embezzled and misappropriated, complainant and his associate stockholders have no remedy through the officers and directors for the redress of such injuries and the recovery of such losses, and their only remedy is this suit brought for the benefit of and on behalf of complainant and all other stockholders similarly situated, and that in the interest of all concerned this court should issue its injunction or restraining order directed to the officers and directors of the company, restraining them from in any manner pledging, mortgaging, encumbering or in any manner creating any lien upon any of the assets of the company until the further order of this court, and that this court immediately appoint a receiver with ample power and authority to institute a full investigation as to the assets, moneys, claims, accounts and transactions of the company and its officers, directors and agents since the company's incorpora-
113 tion and that upon discovery of any misuse, misappropriation, diversion or unlawful transfer of the assets of the company, the receiver be authorized and directed to take all needful, legal or equitable procedure to require return to the corporation of its money, assets and property, and that said receiver be authorized and directed to report from time to time to the court and take such procedure as may be necessary to become fully possessed of all property and assets of the defendant company, and that in the meantime the receiver be authorized and directed to continue the business of the company as a going concern and for that purpose to employ

help and assistants, and direct and operate the company's business, and to employ experienced and capable attorneys, who, under his direction, will institute such legal or equitable proceedings from time to time as the court may direct; that all steps of administration, management and procedure shall be taken and conducted under and pursuant to the orders of this court after full report of the condition of the affairs of the company, and that such other and further procedure may be taken as will preserve the interests of complainant and all stockholders and other persons interested in the affairs of said corporation;

(13) That by reason of the combinations and confederating together of said officers and directors with divers persons unknown to complainant, whose names, when discovered, complainant prays may be inserted herein with apt words to charge them as parties defendant hereto, unless a receiver for all of the assets of the defendant company is immediately appointed, after due notice to the officers and directors of said company, such officers and directors may take precipitate
114 and unwise procedure by creating some species of lien or pledge, or otherwise destroy the credit of the defendant company, so that it will be impossible for the corporation to properly function, and its business to be longer continued as a going business;

(14) Said Daniel Boone Woolen Mills, Inc., is made party defendant, and answer prayed, but not under oath, answer under oath being waived; prayer for an accounting with all directors and officers and other persons who have had to do with the affairs of the corporation; that upon discovery of unlawful misuse, diversion or misappropriation of assets, the court order such complete and adequate procedure as will restore to the company the misapplied property and assets; that when the company has been so repossessed of its assets, moneys and property unlawfully and fraudulently taken from it, the court direct a meeting of stockholders of the company at a date to be fixed by the court, upon due notice, as required by statute and the by-laws of the company, when a new board of directors shall be chosen and shall meet and choose officers for the management of officers of the company, and that after such procedure has been duly reported to the court, the receiver be directed to make his final report to the court, and upon approval thereof, be directed to turn over to such duly elected officers and directors all of the assets of the company

so marshalled by said receiver, and that complainant shall have such other and further relief in the premises as equity shall require and to the court shall seem meet;

(15) Complainant prays for a temporary restraining order and injunction against the officers, directors, agents and attorneys of the company, restraining them from making any conveyance, pledge or hypothecation of any character or description of the assets of the defendant company, or in any manner interfering with its business and affairs until the further order of this court; prayer for summons in chancery directed to the sheriff of Cook County, Illinois, to summon said Daniel Boone Woolen Mills, Inc., to appear on the first day of the next March term of the court, then and there to answer to this bill, etc., and prayer for general relief.

Exhibit 1, Superior Court's order of continuance of February 16th, 1925, in said case of *Hurwitz* v. *Daniel Boone Woolen Mills, Inc.* Exhibit 1

The Superior Court of Cook County, Illinois, sitting in chancery, by his Honor Judge Oscar Hebel, on motion of complainant for the appointment of a receiver to take charge of the assets of the Daniel Boone Woolen Mills, Inc., and upon motion of Barrett & Barrett, solicitors for said last mentioned company to continue said matter in said court, found that the defendant company had received due notice of application for the appointment of a receiver and ordered that motion be continued to Saturday, February 21st, 1925.

Exhibit 10, transcript of proceedings before his Honor Judge Hebel, on February 15th, 1925. Exhibit 10

By agreement of the parties the attending court reporter's transcript of his notes of the proceedings before Judge Hebel on February 16th, 1925, was admitted in lieu of calling the court reporter to the stand to read his notes, as follows:

February 16th, 1925, at 10:00 o'clock A. M. in said Case of *Hurwitz* v. *Daniel Boone Woolen Mills, Inc.*, No. 415641, Superior Court of Cook County, Illinois, in chancery, Mr. Gesas of Gesas, Epstein & Leonard, for the complainant, and Mr. Leonard L. Cowan, of the law firm of Barrett & Barrett, for the defendant, appeared before his Honor Oscar Hebel, one of the judges of said last mentioned court, and the following proceedings were had:

"Mr. Gesas: If the court please, this is a Bill filed by a stockholder, seeking the appointment of a receiver, for the Boone Woolen Mills, Inc. A notice was served on the com-

pany and Mr. Cowan, who appears here this morning, advises me that the company desires a continuance.

"Mr. Cowan: The situation, if the court please, is this, without going into the merits of the bill, whether or not the bill sets up such grounds as would warrant this court in entering a receivership; there are certain important matters now coming before the Board of Directors of this company, which involves some very large amount of finances, and which will be seriously interfered with, if this court undertakes to hear the application, for a receivership. I think those negotiations will be concluded, within a week, and the rights of the complainant, under this bill, will not be affected in any way at all, by allowing this matter to go over for a matter of a week or ten days. I would prefer not to argue the motion this morning, but if counsel insists upon it, of course it will be necessary for me to do it.

"Mr. Gesas: I think the first thing the record should disclose is whether or not these gentlemen are appearing here for the company; there is no appearance on file.

"The Court: Yes, that is right.

"Mr. Gesas: I appear here for the complainant.

"Mr. Cowan: I appear for the company, and will file my appearance in due time.

"Mr. Gesas: In your individual capacity?

117 "Mr. Cowan: The firm of Barrett and Barrett, with which I am associated.

"Mr. Gesas: Now, if the court please, in ths matter, without going into the full matters, there has been a considerable fight, as your Honor happens to see, from this photographic newspaper, in which it is a fight between the former directors against the present directors and the present directors against the former directors—

"The Court: And their compliments were passed back and forth?

"Mr. Gesas: Yes, if the court please, and there has been a loss of over three million dollars in one year in the operation of this business, which practically has been neglected on account of no action taken by these directors, and if any continuance is granted here at all it must be—well, I think the court has a right to hear this matter; that the issues, if any at all are involved, should be tried by this court, not the newspapers, so that the good-will which the stockholders have in this business, and the value of that good-will, if there is

any left after this terrible fight, between the old directors and the new directors, should be placed in status quo, and if there is any continuance granted, I think it ought to be done with the understanding that the status will not be changed, and that the issues be not tried in the newspapers, but by this court.

"The Court: Yes, but of course, I cannot control the newspapers, you understand.

"Mr. Gesas: Your Honor can control the status quo.

"The Court: Yes, with that understanding, but the suggestion that individuals should not seek publicity, of course,—

118 "Mr. Gesas: The situation is this—

"Mr. Cowan: Just a minute. Mr. Gesas complains about trying the case in the newspapers; one of the parties, who is charged with fraud in this bill, published half a page of an advertisement, and it was paid for, I assume, by—

"Mr. Gesas: Here it is.

"Mr. Cowan: (Continuing) —that is something over which we have no control, and which we didn't mail; there has been a two million dollar libel suit against the present President of the company, so that I don't think we could be charged with trying our case in the newspapers.

"Mr. Gesas: I am not making any direct charge, at this moment, as to either the present directors or the former directors, as to their activities, except to say that both are guilty of seeking this publicity.

"Mr. Cowan: Now, the question of publicity—

"Mr. Gesas: Just a minute. May I suggest, if the court please, there is a considerable emergency in this way; from what I understand a form letter was sent out by the present President, in which he advises the stockholders of the terrible condition he finds this company in, at the present time, with the payroll and other expenses which run about one hundred thousand dollars a week; that any great delay in this matter is going to be very harmful to the rights of the parties; of course, we are willing to grant a reasonable continuance, and if this matter goes over to about Friday or Saturday of this week, I should imagine that ought to be a reasonable time, and not have a continuance for one week or ten days. We are here to ascertain our status—

119 "Mr. Cowan: I have no objection to its going over to Friday or Saturday, but personally I think if you let it go until Monday—

"The Court: There is no court Monday; that is what the Clerk tells me. You see Washington's Birthday is on the twenty-second, and we observe it on the twenty-third, the day following.

"Mr. Cowan: Saturday morning, all right.

"Mr. Gesas: Saturday morning, and everything remains in status quo?

"The Court: Yes. Saturday morning, without further notice.

"Mr. Gesas: And any notices, or affidavits that you are going to present—

"The Court: Yes, have them served on the other side, naturally, either side.

"Mr. Cowan: All right, Saturday morning.

"The Court: Yes."

Which were all the proceedings had in the above entitled cause, on this date.

Signed and sworn to by the Court Reporter, Cleary.

2. Exhibit 2, Superior Court's order of February 25th, 1925, granting leave to Max Goldenberg to intervene, etc.

February 25th, 1925, on petition of Max Goldenberg, a stockholder of said Daniel Boone Woolen Mills, Inc., for leave to intervene and be made party complainant and the consent thereto of said Harry Hurwitz, said Superior Court in said Case No. 415641, by his Honor Oscar Hebel, judge presiding, granted leave to said Goldenberg to file his intervening
120 petition in said last mentioned suit, and ordered that he be therefore considered a co-complainant with said Hurwitz, and entitled as such to the same relief as though he had been a party to the original bill therein.

8. Exhibit 8, Written consent of said Hurwitz, filed February 25th, 1925, in said Superior Court to the filing of said Goldenberg's intervening petition, etc.

February 25th, 1925, said Hurwitz filed in the said Superior Court in said Case No. 415641, the written consent of said Hurwitz to the filing therein of said Goldenberg's intervening petition and the adoption of the same by said Hurwitz.

7. Exhibit 7, Intervening petition of Max Goldenberg filed in said Superior Court in said case No. 415641 February 25th, 1925.

The intervening petition of Max Goldenberg, duly entitled in said Superior Court, in chancery, in said cause No. 415641 in said last mentioned court, alleges:

(1) That Max Goldenberg is a resident of Chicago and a stockholder of said Daniel Boone Woolen Mills, Inc.; the owner now of 3000 shares of the common stock of said company, for which the petition paid the sum of $116,180.00;

(2) Recites the filing by Hurwitz on February 14th, 1925, of the original bill of complaint;

(3) Alleges Hurwitz' giving of notice of motion for appointment of a receiver for Monday, February 16th, 1925, before his Honor Judge Hebel, and for injunctional relief; that upon said last mentioned date the complainant and defendant by their respective counsel appeared before his Honor Judge Hebel; that the motion was called and thereupon said Leonard Cowan, of the law firm of Barrett and Barrett, on behalf of the defendant company, stated that
121 there were important financial matters pending before the board of directors of the defendant company which would be seriously interfered with if the court then heard the application for a receiver; that these financial negotiations would be concluded within a week and that the rights of the complainant under his bill would not in any way be affected by postponement of the application for receiver; that complainant, by his attorney, Mr. Gesas, thereupon stated to the court if any continuance was granted it must be upon condition that the status quo be preserved; that thereupon the court said that the status quo should be preserved and that with that understanding the matter would stand continued to the forenoon of Saturday, February 21st, 1925, without further notice, to which said Leonard Cowan then and there assented; thereupon the parties and their counsel left the court room;

(4 and 5) That nevertheless on February 18th, 1925, there was commenced in the District Court of the United States for the Northern District of Illinois, Eastern Division, a suit entitled, *United States Worsted Sales Co., complainant*, v. *The Daniel Boone Woolen Mills, Inc.*, Case No. 4660, in equity, by a creditor; that on the same day notice of said last mentioned suit was served upon the defendant corporation; that the following day, namely, February 19th, 1925, the complainant therein would appear before his Honor Judge Wilkerson, judge of said last mentioned court, and ask for the appointment of a receiver of the assets of the defendant company located within the jurisdiction of the court;

That in said last mentioned bill of complaint, the complain-

ant alleged: That the complainant is a creditor having
122 a claim against the defendant corporation in the sum of $6100.00 which is past due and unpaid; that there are various other creditors of the defendant corporation whose claims are past due or about to become past due for the payment of which no provision has been made by the defendant company; that its officers and directors have been unable to provide for the financing of the company and that the bill of complaint was filed for the purpose of preventing a multiplicity of suits against the defendant corporation; and that the defendant corporation has assets of $1,500,000.00 in access of all its liabilities and is solvent;

That the complainant, the United States Worsted Sales Co., is a non-resident of said district and State of Illinois; that said United States District Court has jurisdiction in the premises on the ground of diversity of citizenship, and the controversy exceeds the sum of $3,000,000.00;

And prays that the complainant be permitted to file its bill for the benefit of itself and all other creditors; that a receiver be forthwith appointed and authorized to take possession of the defendant company's assets and business, and operate the same until the further order of the court, and to take charge and collect all its effects within the jurisdiction of the court, and institute and prosecute suits on behalf of the defendant company, and that the court direct that all assets belonging to the defendant, within the jurisdiction of the
123 court, be declared to be a trust fund to be held and administered for the benefit of complainant and the other creditors and stockholders; that the company's assets be marshalled, the equities of all creditors and shareholders be adjusted, the assets sold and the proceeds distributed among those determined to be entitled to the same, and that the complainant have such other and further relief as to the court may seem just and proper; that pending suit, injunction issue enjoining all persons from levying executions, attaching, intermeddling with, or taking possession of any property of the defendant company;

(6) That the foregoing sets forth in substance the material portions of said last mentioned bill of complaint, and that, as advised by counsel and therefore charged, the same confers no jurisdiction upon the United States District Court to appoint a receiver in the premises of any of the assets of the defendant company, or of the case of the *United States Worsted Sales Co.* v. *The Daniel Boone Woolen Mills, Inc.*;

(7) That notwithstanding the premises, on February 19th, 1925, the Daniel Boone Woolen Mills, Inc., voluntarily entered its appearance and admitted in writing the allegations of said last mentioned bill of complaint and consented to the appointment forthwith by said United States District Court of a receiver of the assets of that company located in the territorial jurisdiction of said last mentioned court; and thereupon, upon motion, in form and in terms, of said United States Worsted Sales Co., and in reliance upon said voluntary
124 appearance and consent thereto, said United States District Court, on said last mentioned date, in terms appointed, under said last mentioned bill, a receiver of the assets of said Daniel Boone Woolen Mills, Inc., located within the territorial jurisdiction of said last mentioned court;

(8) Said Daniel Boone Woolen Mills, Inc., voluntarily furnished said United States Worsted Sales Co., in advance of the filing of said last mentioned bill and after the continuance as aforesaid of said motion in the Superior Court of Cook County, Illinois, for the appointment of a receiver, the facts, or substantially all the facts, alleged in the bill of complaint in the Federal Court; and said written admission of facts was signed by said Joseph Byfield, said Cowan, and said Barrett and Barrett, consenting to the appointment as aforesaid by said Federal Court of a receiver, for the purpose and with the intention of thereby defeating, avoiding and evading jurisdiction of said Superior Court of Illinois, and thereby depriving complainant in said Superior Court and others in the same class of all remedy in the premises; and to this end none of the parties to the Federal Court proceedings gave notice of said case or proceeding to said Hurwitz, said Goldenberg, or said Michael Gesas;

(9) As stated in the bill of complaint in the Federal Court and there admitted, as aforesaid, by the defendant company, the assets of the defendant company exceed its liabilities by upwards of $1,500,000.00, and other than long term real estate mortgages on its plants, the defendant company's present outstanding debts (other than liabilities to stockholders) do not exceed $150,000.00, and cash money sufficient to im-
125 mediately discharge all of said $150,000.00 of liabilities can be made immediately available through the proper appointment by said Superior Court of a receiver of the defendant company's assets and the issue, under order of court, on terms usual in such cases, of receiver's certificates in a

total of $150,000.00, negotiation of which can readily be made in the financial markets of Chicago;

(10) By reason of the premises, the Daniel Boone Woolen Mills, Inc., is now without executive head, competent, disposed or willing to represent or care for the interest of the company and its stockholders; on the contrary, the present nominal executives and officers of the company, for one purpose or another or for one reason or another have abandoned the company to the hands of creditors, whose claims as compared with the interest of stockholders are insignificant in amount; that the United States District Court is without jurisdiction in the premises, and its lack of jurisdiction should, in the interest of your orators and other stockholders, be called to the attention of the Federal Court, to the end that the rights of stockholders as well as creditors be properly protected and the burden of a double administration of the affairs of the company be avoided;

11, 12, 13, 14 and 15) That one Oscar Gumbinsky is one of the original subscribers of the stock of the defendant company, and from the date of its incorporation to November 14th, 1924, a director and president of the same; that David N. Zemans is a brother-in-law of said Oscar Gumbinsky, and now is and has been since March 1st, 1921, a director of the company; that from March 7th, 1922 to January 22nd, 126 1923, said Zemans was its vice-president, and now is and has been since January 25th, 1923, secretary of the company; that Robert F. Wallace was a director of the company from March 1st, 1921, to January 2nd, 1923; that Herman Gumbinsky was one of the original subscribers to the stock, and from January 2nd, 1923, to November 14th, 1924, was a director and the treasurer of the company; that Nathan Gumbinsky is a brother of said Oscar Gumbinsky; that George S. Szere was a director of the company from May 19th, 1922, to September 9th, 1924; that W. C. Hammond was a director of the company from May 19th, 1922 to November 14th, 1924; that Stephen S. Stratton now is and was a director of the company since January 21st, 1923; that John G. Huntoon was a director of the company from January 11th, 1923, to November 14th, 1924;

(16 and 17) That Gumbinsky Brothers Company is an Illinois corporation organized in 1919; that Oscar Gumbinsky, Herman Gumbinsky and Nathan Gumbinsky are now, and have since its incorporation been its principal stockholders, and have at all times controlled and directed its operations;

that Max Krause was the general sales manager of the Daniel Boone Woolen Mills, Inc., during the year 1923;

(18) That in 1919 the defendant company entered into a fifteen-year, $30,000.00-a-year lease of certain premises with Nathan Gumbinsky; that at that time Oscar Gumbinsky, Robert F. Wallace and David N. Zemans were the reputed owners of record of the capital stock of the defendant company, but in fact Oscar Gumbinsky was the owner of all of its capital stock on said last mentioned date to August 31st, 1921;

That during 1920 and 1921 the company operated at a loss and its capital stock was impaired some $83,000.00; from
127 June, 1920, to October 1st, 1921, it sustained a loss of some $90,000.00; that to overcome these losses and depreciation Oscar Gumbinsky had the assets of the company falsely appraised at excessive valuation, but that there still remained an impairment of stock, and in August, 1921, the capitalization was increased to 6,000 shares of preferred stock at the par value of $100.00 each and 25,000 shares of common stock at the par value of $25.00 per share; that at the time of this increase all the outstanding stock of the company was owned by Oscar Gumbinsky, and on August 15th, 1921, he caused the directors of the corporation, namely, himself, said Wallace and said Zemans to authorize an exchange with him of 25,000 shares of common stock of the par value of $25.00 per share, aggregating $625,000.00, for 4,000 shares of preferred stock and 5,000 shares of common stock of the par value of $430,000.00, although the company then had no surplus, but, on the contrary, an impairment of capital; that said exchange of stock was fraudulent and in violation of the laws of Illinois;

(19) That on August 31st, 1921, the company's directors authorized a sale of 6,000 shares of preferred stock of the company, which stock was qualified as "Class D" stock, that is, speculative securities under the Illinois Securities Act, but were unable at that time to effect sales of the same;

(20) That on December 29th, 1921, Gumbinsky Brothers Company claimed the defendant company was indebted to it in excess of $300,000.00, and said Oscar Gumbinsky, who was at the time president of both companies and principal stockholder thereof, caused to be issued by the defendant company to said Gumbinsky Brothers Company $300,000.00 of preferred stock in payment of said alleged account;

128 (21) That on or about December 28th, 1921, Oscar Gumbinsky, Nathan Gumbinsky, Herman Gumbinsky and

David N. Zemans entered into a conspiracy to so manipulate the affairs of the defendant company as to create the impression that the company was prosperous and thereby mislead the public and induce investors to purchase the company's stock, and to enable Oscar Gumbinsky and his co-conspirators to fraudulently divert to themselves moneys so secured through secret agreements, alleged purchases of merchandise at exorbitant prices, alleged diversion of merchandise without compensation therefor to said company, exorbitant salaries, sales of real estate and by other methods to complainant unknown; that for this purpose Oscar Gumbinsky returned 12,500 shares of common stock to the defendant company, and on February 15th, 1922, the same were sold by brokers;

(22, 23 and 24) That in connection with the application to the Securities Commission of the State of Illinois for authority to sell said 12,500 shares of stock, and in pursuance to said conspiracy Oscar Gumbinsky, on or before January 31st, 1922, caused to be placed on the books of the company, as an asset of good-will, the amount of $333,652.65, notwithstanding the fact that the company's prior operations had resulted in losses, offset in part by said prior forced appreciation of assets by way of good-will entered at $111,583.41; and in further pursuance of said conspiracy, said Oscar Gumbinsky caused entries to be made on the company's books to make it appear that the 12,500 shares of stock returned by him to the company was an asset of the company in the sum of $312,500.00 as donated surplus, when in fact said Oscar Gumbinsky had received this 12,500 shares of stock, ag-
129 gregating with certain common stock of the company, as aforesaid, $625,000.00, in exchange for $425,000.00 par value of stock previously owned by him at a date when said $430,000.00 par value of stock had a book value of only $292,000.00;

(24a and 24b) On the foregoing basis, and by falsely representing the facts, as aforesaid, to the Securities Commission of Illinois, said Oscar Gumbinsky and R. F. Wallace secured license from said Commission for the company to sell said 12,500 shares of common stock to the public;

(25) That on March 7th, 1922, the board of directors of the defendant company, consisting then of Oscar Gumbinsky, David N. Zemans and R. F. Wallace, declared a dividend of 75c per share on common stock of the defendant company for the purpose of creating an appearance of prosperity, when in

fact on that date the defendant company had no earnings whatever out of which to pay such dividends, and similarly, and under like circumstances, on June 2nd, 1922, declare a further dividend on common stock of 75c per share;

(26-28) That there after the stock of the defendant company was further manipulated, was increased, and other issues fraudulently qualified with the Illinois Securities Commission by similar methods, its stock listed upon the Chicago and New York Stock Exchanges, and a fictitious market for the same created to enable said Oscar Gumbinsky to sell and dispose of his own stock;

(29-31) In order to provide the company with an apparent surplus means to pay dividends and a fictitious financial strength, said Gumbinsky, in 1923, caused to be set forth in the books of the company as assets, and omitted to set up other items as liabilities, and caused the plant at 130 Baltic, Connecticut, to be purchased by the company for $150,000.00, but entered up on the books of the company at some $225,000.00 in excess of cost; that in statements to stockholders for 1923 liabilities for salaries to employees and executives in an aggregate of $30,000.00 were omitted, and also pretended liability of Gumbinsky Brothers Company for advances in the amount of $100,000.00, but, on the other hand, the item of good-will was increased something over $20,000.00, and the item of organization expense as an asset increased some $40,000.00; that in April and July, 1924, dividends of 75c per share on the common stock of the company were paid, when in fact there were no earnings for surplus available for the same; that during the year 1924 the dividends so paid aggregated some $375,000.00;

(32) That by reason of the premises, the Daniel Boone Woolen Mills, Inc., was by October, 1924, in serious, financial difficulties; that certain stockholders made demands on Oscar Gumbinsky and the defendant company for an accounting and investigation; that thereupon Oscar Gumbinsky on or about November 10th, 1924, resigned as director and president and caused Herman Gumbinsky likewise to resign, but that immediately prior thereto Oscar Gumbinsky caused the defendant company to pay Gumbinsky Brothers Company $115,000.00 for alleged advances by it, included in which were advances chargeable to the years 1923 and 1924, but never entered upon the books of the company, which were not expenditures for which the defendant company could justly be charged;

(33) That upon the resignation of Oscar Gumbinsky and Herman Gumbinsky, Joseph Byfield was elected presi-
131 dent and has since about November 14th, 1924, occupied the position of director and president; that thereafter it was discovered many of the original records of the company, revealing the transactions above described, had disappeared; that therefore it has been impossible to fully and entirely discover the facts from the remaining records of the company, though the new management, through partial investigation, discovered irregularity, and brought two suits in the courts of Cook County to recover moneys from Gumbinsky Brothers Company, which are now pending;

(34) That the operations of the company require in excess of $60,000.00 per month in payroll alone, and the total expenditures exceed $100,000.00 per month; that there are seven plants located in Illinois, Iowa and Connecticut; the majority of which are held under lease at large rentals; that from November 14th, 1924, to December 31st, 1924, the only goods sold were finished goods, and the result a loss exceeding $75,000.00; that the company during that period manufactured merchandise for spring orders, but because of the advertisement of the company as in hopeless financial condition unable to finance its operation, the merchandise cannot be sold in the regular course of its business; that on December 31st, 1924, the company had outstanding liabilities to banks and other creditors in excess of $300,000.00, a mortgage indebtedness on its plants of $412,500.00, part of which are past due, and a large part of which will shortly become due and payable; that on December 31st, 1924, the company had cash on hand of $47,582.13, and has not been able to procure any additional financing since that date; that of the accounts receivable aggregating $370,000.00, existing on said last mentioned
132 date, approximately one-half are disputed and subject to adjustment; that while the inventory totals some $618,000.00, only some $19,000.00 represent finished goods and the remainder is raw materials, goods in process and unfinished goods, which require additional cash to finish and put in merchantable condition for sale;

(35) That many salesmen of the company have left its employment, and that advances made in the regular course of business to such salesmen amount to a large sum, and that so many of its employees have left as to impair the efficiency of its operations, and the company will become hopelessly insolvent unless immediate action is obtained by this court;

(37) That by reason of the failure of its officers and directors to take necessary proceedings of their own initiative to conserve the assets of the company, compel the return of such assets as have been unlawfully and fraudulently taken, appropriated or dissipated, or to take any steps towards rehabilitating the credit of the company through a vigorous and intelligent administration of its affairs, complainants have no remedy through the company's officers and directors, but are compelled to look to their independent suit brought by your orators for the benefit of all other stockholders similarly situated, joining in with said complainant, Harry Hurwitz, seeking the appointment of a receiver to husband the assets of the company, administer its affairs along business lines, pay off its creditors and rehabilitate its business;

That your orator heretofore caused demand to be made through his counsel upon the present management of the company to take steps to discover what property of the company had been misappropriated and by whom and by what means the same could be restored to the company, and this his
133 request was refused, wherefore your orator shows that the court should issue its injunction directed to the officers and directors of the company, enjoining and restraining them from in any manner pledging, mortgaging, encumbering or creating any lien upon any of the assets of the company, and prays the court to immediately appoint a receiver pendente lite of the defendant company with the usual powers of receivers in such case, and with authority to institute careful and full investigation as to the assets and transactions of the company, its officers, directors and agents, and said receiver be authorized to take all necessary legal or equitable procedure to require a return of all assets and property of the company which the receiver may discover have been wrongfully or illegally misappropriated, and to take such procedure as may be necessary to become fully possessed of all property and assets of the company wrongfully or unjustly converted by anyone, and directed to continue the business of the company as a going concern, and that if the collectable accounts due it are insufficient from time to time to meet the payroll and other necessary disbursements; that the receiver be authorized to issue receiver's certificates under order of court, and that after full report of the conditions of the affairs of the defendant company, such other and further procedure may be taken as will conserve the interest of the company, your orator and all stockholders;

(38) That by reason of the combination of confederating together of said officers and directors of the defendant corporation with divers persons unknown to your orator, whose names when discovered your orator prays will be inserted with apt words to charge them parties defendant hereto, and as a result of said conspiracy and wrongs, losses and mis-
134 appropriations of a large portion of the assets and profits of the corporation have arisen, and unless a receiver for all of the assets of said corporation be immediately appointed, after due notice to the officers and directors of the said defendant corporation, its officers and directors may take precipitate and unwise procedure by creating some species of lien or pledge or otherwise destroy the credit of the defendant corporation, and its business no longer be taken as a going concern;

(38) That said Oscar Gumbinsky departed this life February 17th, 1925;

(39) Prayer for answer, but not under oath, by Daniel Boone Woolen Mills, Inc.; that an accounting be taken of all the acts by all of the directors, officers and other persons with the affairs of the corporation, and that upon discovery of any unlawful misuse, diversion or misappropriation of the assets, the court order such complete and adequate procedure as will restore the misapplied property unlawfully, fraudulently and unjustly taken from it; that the court direct a meeting of the stockholders of the company to be held in accordance with the statute of the State and by-laws of the company, at which a new board shall be chosen; that under order of court such board of directors shall then meet and choose officers of the company, and upon report of their procedure by order of court, the receiver in charge of the assets of the defendant corporation be required to make his final report to the court, and upon approval thereof, be directed to turn over to such duly elected officers and directors of the defendant corporation all assets so marshalled by the receiver, less his reasonable charges and expenses as may be approved by the court, and that complainant have such other and further relief in the premises as equity shall require, etc.;

135 (40) That a temporary restraining order immediately issue against the officers and directors, agents, servants, and attorneys of the defendant corporation, restraining them from making any conveyance, pledge or hypothecation of the assets of the defendant company, or in any manner interfer-

ing with its business or affairs until the further order of the court;

(41) Prayer for process, summoning of Daniel Boone Woolen Mills, Inc., to the next April Term of the court, etc.

Exhibit 3, Superior Court's order of February 28th, 1925, appointing receivers. Exhibit

February 28th, 1925, by a written order duly entitled in said Superior Court, in chancery, in said cause No. 415641, said Superior Court appointed the Union Bank of Chicago and Daniel V. Harkin receivers pendente lite of all the property of said Daniel Boone Woolen Mills, Inc., including its books, records and accounts. The order recites that the cause comes on to be heard upon the verified bill of complaint, the motion of Hurwitz entered February 16th, 1925, for the appointment of a receiver, and the verified intervening petition and motion for receiver of Max Goldenberg; finds that due notice has been given to the defendant corporation in the premises, and that the same appears and is present in open court by its counsel; that the court has jurisdiction of the subject matter and the parties; orders that said receivers have the usual powers of receivers in such cases; requires that they give bond in the sum of $100,000.00; finds that upon good cause shown upon notice and hearing the court is of the opinion that said receivers should be appointed and this order entered without bond from the moving parties or any of them, and that it is accordingly so ordered;

136 Orders that receivers continue the business of the company; that each and every officer, director and agent of the company forthwith upon demand turn over to the receivers all books, papers, moneys, property, etc., of the company under their control, and that the company immediately execute and deliver to the receivers all proper assignments and conveyances and fully vest the receivers with custody and control of all the property, moneys, accounts and effects of the defendant company;

That the receivers be vested with power to prosecute and defend without further order all existing actions by or against the defendant company and pay and defray the expenses incident thereto, and take such other procedure as in said receivers' judgment is necessary to protect the property, accounts and claims of the defendant company from all interference, molestation or other control by any person or persons whatsoever; that the defendant corporation, its officers and directors are ordered to refrain from in any manner encum-

bering, pledging or creating any liens or charges whatsoever against the property, accounts, and assets of the defendant corporation; and that they account and turn over to the receivers all moneys, accounts and property belonging to the defendant corporation or in which it is in anywise interested.

Exhibit 4, Superior Court's order of March 2nd, 1925, approving receivers' bond.

March 2nd, 1925, by written order duly entitled in said Superior Court, in chancery, said cause No. 415641, said Superior Court, in chancery, on motion of said State Court receivers, approved their bond in the penal sum of $100,000.00 with the United States Fidelity and Guaranty Company, as surety.

137 Exhibit 5, Superior Court's order of March 13th, 1925, granting leave to file engrossed, amended and supplemental bill, etc., by

By written order entered by said Superior Court, in chancery, March 13th, 1925, duly entitled in said last mentioned court, and in said cause No. 415641, said Superior Court, in chancery, on motion of complainants, and due notice of said motion to the defendant corporation, granted leave to complainants to forthwith file their engrossed, amended and supplemental bill of complaint, and said engrossed, amended and supplemental bill having been so filed, as recited in said order, further ordered that the order theretofore entered therein on February 28th, 1925, appointing receivers of said Daniel Boone Woolen Mills, Inc., stand under said engrossed, amended and supplemental bill of complaint, and further ordered that the defendant company plead within forty-six days, the date of said last mentioned order, and that summons issue as in said engrossed, amended and supplement bill of complaint prayed to the defendants thereto other than said Daniel Boone Woolen Mills, Inc.

138 "EXHIBIT 9"

Engrossed, Amended and Supplemental Bill Filed in the Superior Court in Chancery March 13th, 1925.

March 13, 1925 complainants Harry Hurwitz and Max Goldenberg filed in said Superior Court of Cook County in Chancery, duly entitled in said court and in said cause Number 415641 their sworn, engrossed, amended and supplemen-

tal bill of complaint against The Daniel Boone Woolen Mills, Inc., a corporation, Gumbinsky Bros. Co., a corporation, and Harry J. Nathan, and Herman M. Gumbinsky and the Central Trust Company of Illinois, a corporation, Executors of the will of Oscar Gumbinsky, deceased; David N. Zemans, Robert F. Wallace, Herman M. Gumbinsky, Nathan Gumbinsky, George S. Szere, Stephen S. Stratton, John G. Huntoon, William C. Hammond, Max Krause, Joseph Byfeld, Frank Solomon, Russell Bonynge and Valley Appel, a minority stockholders' bill as follows:

1. Hurwitz is a stockholder of the Daniel Boone Woolen Mills, Inc., an Illinois corporation for profit with its principal office and place of business in Chicago, Illinois and owns 100 shares of the common stock of the company for which he paid $3600.00; said Goldenberg is the owner of 3,000 shares of the common stock of the company for which he paid a total of $116,180.00. Complainants bring suit on behalf of themselves and all other stockholders similarly situated, etc.

2. The organizing and purpose of organizing of the Daniel Boone Woolen Mills, Inc., are stated in detail. The company's principal place of business is in Chicago, but it also owns and operates plants at Moline and Rock Island, Illinois, Davenport, Iowa and Baltic Connecticut.

3. The character and total of the capital stock of the company as originally incorporated and from time to time changed and increased is set out substantially as in the intervening petition of Max Goldenberg. The stock of the 139 company has for substantial periods during its existence been actively traded in on both the Chicago Stock Exchange and the New York Stock Exchange, and in consequence is now very widely held.

4. At its inception and until about February 1922, the board of directors of the company numbered three but on the latter date was increased to seven. The present directors are: Joseph Byfeld, Frank Solomon, Russell Bonynge, Valley Appel, David N. Zemans, Stephen S. Stratton, and John G. Huntoon, and the present officers are: Joseph Byfeld, President, Frank Solomon, Vice-President and David N. Zemans, Secretary, there being at present no treasurer.

5. Oscar Gumbinsky (since deceased) was one of the original stockholders, and from its inception until November 14, 1924, a director and president of the company, and until about August 31, 1921 the owner of all of its outstanding stock, two shares of which stood, however, one in the name of

Robert F. Wallace and the other in the name of David N
Zemans. (Zemans was a brother-in-law of Oscar Gumbin
sky). From its inception until about March 1922, Oscar
Gumbinsky, said Wallace and said Zemans constituted the
entire board of directors of the company and held all its
offices, Oscar Gumbinsky being President and Wallace and
Zemans Secretary and Treasurer, respectively. At all times
hereinmentioned until his death Oscar Gumbinsky dominated
and controlled Wallace and Zemans in respect to their acts
and doings as directors and officers of the company. On or
about March 1922 and following there were changes from
time to time in the personnel of the board, but until Novem
ber 14, 1924 Oscar Gumbinsky dominated and controlled all
of the directors and officers of the company. The changes
from time to time so far as known to the complainants are
set out in detail.

6. Gumbinsky Bros. Co. is a corporation for profit, or
ganized under the laws of Illinois about 1919, with its prin
cipal place of business in the City of Chicago. Oscar Gum
binsky (until his death in 1925) and Nathan Gumbinsky and
Herman Gumbinsky, his brothers, are and have been the prin
cipal stockholders of Gumbinsky Bros. Company, and have
dominated, controlled and directed its operations and its
board of directors.

140 9. During 1920 and 1921 the Daniel Boone Woolen
Mills, Inc. was operated at a loss and its capital stock
impaired, and various and sundry false entries were caused
by Oscar Gumbinsky to be made on the books of the company
to cover up the impairment of stock, and dividends were
caused to be paid on the common stock of the company al
though in fact the company had no profits or surplus out of
which to pay the same.

11. On or about December 27, 1921 Oscar Gumbinsky,
Nathan Gumbinsky, David N. Zemans, Herman Gumbinsky,
Robert F. Wallace and Gumbinsky Bros. Co., a corporation,
unlawfully and fraudulently entered into a conspiracy with
each other and others unknown to complainants, to unlaw
fully and fraudulently manipulate the affairs of the Daniel
Boone Woolen Mills, Inc. so as to deceive the public as to
the financial condition and induce them to purchase its cap
ital stock at prices in excess of the fair, reasonable and ac
tual value, and to enable Oscar Gumbinsky and his co-con
spirators to fraudulently and unlawfully divert from the
Daniel Boone Woolen Mills, Inc., its assets and properties

through secret, unlawful and fraudulent agreements and manipulations and alleged purchases and sales of merchandise by said Gumbinsky Bros. Co. to the said Daniel Boone Woolen Mills, Inc., at exorbitant and fraudulent prices and through fraudulent diversion of merchandise and property of the Daniel Boone Woolen Mills, Inc., to the conspirators, and through fraudulent and unlawful manipulation and sales or leasing of real estate, etc. etc.

12. In December 1921, pursuant to the conspiracy, Gumbinsky Bros. Co. presented a fraudulent claim against the Daniel Boone Woolen Mills, Inc., for the sum of $300,000 on account of pretended transactions and dealings between the two companies, and in pretended payment of said last mentioned claim the conspirators caused the Daniel Boone Woolen Mills, Inc., to issue to Gumbinsky Bros. Co. certificates of preferred stock of the former company of the par value of $300,000.

141 14. Pursuant to said conspiracy in January 1922, Oscar Gumbinsky caused to be placed on the books of the company as an assets of good will $333,652.65 although in fact the company had during the period of its operations to date continuously suffered losses which from September 13, 1921 to January 31, 1922 were $254,302.73.

15. Pursuant to the conspiracy a false pretended donated surplus of $312,500.00 was caused to be entered upon the company's books.

16. And false and fraudulent statements (the nature and falsity in fact of which was set forth in the bill) were made to the Illinois Securities Commission in order to qualify the stock of the Daniel Boone Woolen Mills, Inc., for sale to the public.

18. And dividends were from time to time declared and paid although in fact there were no earnings or surplus out of which to pay the same.

25. Pursuant to the conspiracy Oscar Gumbinsky by manipulation through various brokers caused the market value of the company's stock to be increased by means of wash purchases and sales.

26 and 27. And after further increases in the capitalization of the Daniel Boone Woolen Mills, Inc. said Oscar Gumbinsky pursuant to the conspiracy caused certain of its stock to be qualified for sale on the New York Stock Exchange.

29. And the conspirators, pursuant to the conspiracy, otherwise falsely manipulated the books of the Daniel Boone

Woolen Mills, Inc., the details of which are set out, to give a false apparent book value to its stock in excess of its actual book value and to deceive the stockholders in the premises.

33. And caused false inventories of the company's assets to be made and published.

34. Pursuant to the conspiracy said conspirators during the year 1922 to November 1924 caused the Daniel Boone
142 Woolen Mills, Inc., to purchase its raw materials from Gumbinsky Bros. Co. at prices far in excess of their fair market value, and caused the former company to make payments to said Gumbinsky Bros. Co. for alleged purchases of raw materials which were never in fact delivered to the Daniel Boone Woolen Mills, Inc. and made Gumbinsky Bros. Co. the exclusive purchaser from the Daniel Boone Woolen Mills, Inc. of all of its waste, and the same was caused to be sold to said Gumbinsky Bros. Co. at prices far below the fair market value, and caused other waste and merchandise to be delivered by said Daniel Boone Woolen Mills, Inc. to said Gumbinsky Bros. Co. for which no payments were ever made by the latter company, and caused moneys to be loaned by the Daniel Boone Woolen Mills, Inc. to said Gumbinsky Bros. Co. without any accounting of the profits therefrom to the former company, and that as a result the former company was defrauded by the conspirators in a total in excess of $1,000,000.

35. In November, 1923, pursuant to the conspiracy, Oscar Gumbinsky caused the Daniel Boone Woolen Mills, Inc. to purchase from Nathan Gumbinsky certain real estate theretofore held by the company under a fifteen year lease, at a purchase price of $435,000 which valuation and price was in excess of its fair nad actual value; that as a part of the transaction and pursuant to the conspiracy the company was formed to assume a mortgage indebtedness of $300,000 as a pretended part of the purchase price which mortgage had been placed on the property pursuant to the conspiracy and in contemplation of the sale of the property to the Daniel Boone Woolen Mills, Inc.

36. That as the result of the fraudulent acts of the conspirators and their failure to honestly and properly conduct the affairs of the company, the Daniel Boone Woolen Mills, Inc. in October 1924 was in serious financial difficulty; that certain of the stockholders made demands on Oscar Gumbinsky for an accounting and investigation in the premises, and

thereafter on or about November 10, 1924 Oscar Gum-
143 binsky resigned as President and director and caused Herman Gumbinsky to likewise resign, but immediately prior thereto pursuant to the conspiracy Oscar Gumbinsky caused the company to pay to Gumbinsky Bros. Co. the sum of $115,000 for alleged advances; that included in this $115,000 were advances chargeable to the years 1923 and 1924, which had never been entered upon the company's books, and for which the company could not justly be charged, and the payment of the $115,000 was fraudulent and illegal.

37. That about November 14, 1924 following the resignation of Oscar Gumbinsky and Herman Gumbinsky, Joseph Byfeld was elected President of the company and has since that date been President and a director; that after this change of officers it was discovered that many of the original records of the company revealing the transaction above referred to could not be found, and therefore it has been impossible to fully and entirely discover the facts in the premises through partial investigation. The new management of the company discovered irregularities and brought two suits against Gumbinsky Bros. Co. which are now pending.

38. Joseph Byfeld caused an audit to be made and submitted a report thereof to the stockholders from which it would appear the company has a deficit of over $2,500,000, copy of which report is attached; that on or about February 12, 1925 Joseph Byfeld informed the complainants and other stockholders that the company's balance sheet on December 31, 1923 showed a surplus of some $468,000 whereas the statement of February 2, 1915 shows a deficit of some $2,700,000 or a shrinkage in assets from December 31, 1923 to February 2, 1925 of over $3,000,000; that on February 2, 1925 Joseph Byfeld as President as aforesaid, stated to the public press and in writing to complainants and all other stockholders that his investigation revealed conditions worse than he had imagined; that after ten weeks of constant attention to the business he was compelled to report that his original hope
of saving the company was well nigh impossible; that dis-
144 couragement lay in the fact that there was seemingly no limit to the involved situation; that seldom in the history of a large American enterprise had a business been so woefully mismanaged and a general public so brazenly deceived. That the existing management was then (February 2, 1925) operating the company's plants from collection of accounts, but that this could not continue indefinitely. With weekly

pay rolls ranging from $15,000 to $20,000, large outlays in cash for woolens and other materials, etc., immediate action by the stockholders in the matter of financing was imperative.

39. Nothwithstanding the premises no action has been instituted against the former officers and directors of the Daniel Boone Woolen Mills Company, nor any attempt made to recover the huge sums of money converted by said former officers and directors, nor is there any promises or indication that said Byfeld and his present associate officers and directors contemplate any such procedure, and that therefore, the only possibility of relief is the immediate appointment of a receiver with power and direction to cause a thorough examination of all the acts and doings of those who have misapplied or misappropriated the assets of the company and to institute such legal or equitable procedure as may be necessary and will be effective in securing a return to said company of its property or the proceeds thereof.

40. That by reason of published statements by Byfeld and paid advertisements appearing in papers inserted by Oscar Gumbinsky pursuant to said conspiracy, and of charges and countercharges therein between said Byfeld and his associates and the former officers and directors, the good will of the Daniel Boone Woolen Mills, Inc. has been destroyed, and therefore, the appointment of a receiver at this time will not jeopardize the business of the company, but on the con-
145 trary give to all concerned assurance that its affairs will be hereafter conserved and all parties liable to account be called upon for an accounting.

41. Prior to January 1, 1925, complainant Max Goldenberg caused demand to be made upon the said Joseph Byfeld, as President as aforesaid, to take proper legal and equitable steps to discover what properties of the Daniel Boone Woolen Mills, Inc. had been misappropriated in the premises and by whom, and to recover the same, and specifically to institute suit or suits on behalf of said last mentioned company against Oscar Gumbinsky and his abovementioned co-conspirators, but the said Joseph Byfeld for and on behalf of the company then and there refused Max Goldenberg said demands and requests and refused to cause an investigation to be made in the premises; that said demand and request by Goldenberg and refusal thereof by said Joseph Byfeld was known to the complainant Hurwitz prior to the institution of the above entitled cause, and thereby said Harry Hurwitz was advised as the fact is that any other or further demand or request by

said Harry Hurwitz upon the company in the premises would have been useless.

44. That unless immediate relief is afforded the complainants in the premises not only will the company suffer losses heretofore brought about by the acts of the conspirators, but the company will suffer further injury and loss through the acts and omissions of the present officers, and in the interest of all concerned the court should restrain the present officers and directors from in any manner pledging, mortgaging, encumbering, or in any manner creating any lien upon any of the assets of the Daniel Boone Woolen Mills, Inc. until the further order of the court, and immediately appoint a receiver of said company, etc., etc. and complainants hereby offer to do equity in the premises.

45. That losses and injuries have already been sustained amounting to a large sum of money, to-wit: $4,000,000,
146 and unless a receiver for all of the assets of the company is immediately appointed, upon due notice to the defendant corporation, the company's present officers and directors may take precipitate and unwise precedure by creating some species of liens or pledges, or otherwise destroy the credit of the company so that it will be impossible for the company to properly function, and its business be continued as a going business.

46. That the operations of the said Daniel Boone Woolen Mills, Inc., require some $60,000 per month for pay rolls alone and the total expenditures exceed $100,000 per month, etc., etc.

47. That employees to whom advances have been made in a large aggregate and other employees of the company have left its employ and the efficiency of its operation has thereby been seriously impaired and the morale of the help destroyed.

48-53. These paragraphs of the engrossed, amended and supplemental bill of complaint set up the filing of the original bill of complaint by Hurwitz, the coming on of the motion in the Superior Court before his honor Judge Hebel for the appointment of a receiver, the stipulation of counsel and continuance of the motion for the appointment of a receiver; the commencement of the suit of the United States Worsted Sales Company in the Federal Court and the appointment of the Federal Court receiver substantially as set out and charged in the intervening petition of Max Goldenberg, and in the motion of the State Court Receivers (above presented) in the Federal Court for an order on the Federal Court re-

ceiver to turn over the assets to the State Court Receivers, elsewhere appearing in the record.

54. As stated in the bill of complaint in the United States District Court and admitted by the answer in that court of the said Daniel Boone Woolen Mills, Inc., and as set forth in the original bill of complaint filed herein by said Harry Hurwitz, the assets of the said Daniel Boone Woolen Mills,
147 Inc., exceed its liabilities by upwards of $1,500,000, and other than long term real estate mortgages on said company's plants the company's present outstanding debts (other than liabilities to stockholders) do not exceed $150,000, and cash money sufficient to immediately discharge the $150,000 of liabilities can be made immediately available through the appointment by this court of a receiver of the company, with the usual powers of receivers in such cases, as in said original bill of complaint prayed, and the issue under order of this court on terms usual in such cases, of receivers' certificates in the total sum of $150,000, negotiation of which can readily be made in the financial markets of Chicago.

55. By reason of the premises, the said Daniel Boone Woolen Mills, Inc., is now without any executive head, or heads, competent and disposed, or willing, to represent or care for the interests of itself or its stockholders, and to the contrary the present nominal executives and officers of the company, for one purpose or another, or for one reason or another, have abandoned the company to the hands of creditors whose claims are in amount as compared with the interests of stockholders, insignificant; that the United States District Court is without jurisdiction in the premises and this lack of jurisdiction should be called to its attention to the end that the rights of the stockholders of the company, as well as of the creditors, be properly protected, and that the burden of a double administration of the affairs of the company be avoided.

56. On February 17, 1925 at Chicago, Illinois, said Oscar Gumbinsky departed this life testate, and by his will appointed as executors of his estate Harry J. Nathan, Herman M. Gumbinsky and the Central Trust Company, of Illinois, a corporation, who have accepted and qualified as such.

The prayer of the bill of complaint for relief is in the usual form, prays answer, but not under oath from all defendants, for an accounting, for a temporary restraining order on the officers and directors of the company restraining them
148 from in any manner encumbering, pledging or creating liens or charges upon or against the property of the com-

pany, and from making any conveyance, pledge or hypothecation of any of its assets, or in any manner interfering with its business or affairs until the further order of the court, and that a receiver pendente lite be appointed (and upon decree continued for the purpose of affording full relief in the premises) of the assets of the company, its books, papers and accounts, etc. etc; that the receiver have the usual powers of receivers in such cases, and also be authorized to continue its business and to prosecute and defend all existing actions by and against the company and to take all necessary procedure to protect its property and accounts from interference, molestation or control by any other person or persons whatsoever and for general relief, and closes with prayer for process and writ of injunction, etc.

Page 15. Page 5. Complainant by its counsel objected to the admission in evidence of Exhibits 2, 3, 4, 5, 7, 8 and 9 on the grounds that they were pleadings filed and orders entered in the State Court subsequent to the appointment of a receiver by this court and therefore incompetent, irrelevant and immaterial to any issue here presented which issues are to be here determined in relation to the situation which existed in the State Court at the time the receiver here was appointed. To the overruling of which objections and each of them the court allowed to complainant on.

Page 16. It is stipulated between the parties that no other pleadings by way of bill, amend bill or supplemental bill were filed in the Superior Court.

149 LEONARD L. COWAN called as a witness by State Court Receivers being first duly sworn testified as follows:

Direct Examination by Mr. Whitman.

I am a lawyer and associate counsel in this case with the law firm of Barrett & Barrett. I was present in court and heard the examination of the preceding witness. I was in court before his honor Judge Hebel of the Superior Court on February 16, 1925, when the order of continuance entered on that date, a copy of which was produced by the witness before me, was arranged for. I did not see the Judge sign the order. I am familiar in a general with the intervening petition of Max Goldstein filed in the State Court proceed-

ings on Feb. 25th. I was present in court before his honor Judge Denis E. Sullivan February 28th when the State Court receivers were appointed. At that time there was some colloquy touching the occurrence before Judge Hebel on February 16th.

Q. Calling your attention to Paragraph Number three of that intervening petition, do you recall stating to Judge Sullivan at that time that that paragraph of the intervening petition substantially stated the occurrence before Judge Hebel on February 16th, 1925?

Mr. Johnston: I object, not to the form of the question, but to the admission in evidence of what occurred in the State Court on February 16th, that is as to the conversation, as not competent, relevant or material, and on the further ground that what took place subsequent to the appointment of a receiver in this court is incompetent and irrelevant,, and because there is no allegation in the State Court receivers' petition in this court that the complainant in this case or his counsel knew anything of any verbal arrangement made by Mr. Cowan in the State Court.

The Court: Objection overruled.

150 A. I can hardly answer that question, yes or no, but I can answer and explain my answer. Answering counsel's question I should say that that paragraph number three is substantially incorrect. I told Judge Sullivan that the colloquy had taken place—

I appeared before Judge Hebel in the State Court case on February 16th, 1925 as attorney for the Daniel Boone Woolen Mills, Inc. I had been acting as such for some time and am still so acting. The notice of motion on February 16th, 1925 for the appointment of a receiver in the State Court was not served upon me, but upon Mr. Byfeld, the President of the company, and he had turned it over to my office. Pursuant to that notice I appeared before Judge Hebel—the motion for the appointment of a receiver was called by the Clerk. Thereupon, Michael Gesas appeared. As I remember he told the court he had filed a bill, that this was a motion for the appointment of a receiver—that he and I had had some conversation prior to calling the motion—I had stated to him that there was certain financing in connection with the company's business then under negotiation that would be affected by a hearing on the motion that morning and that I proposed to ask for a continuance on that ground. Either Mr. Gesas or I told the court that I desired

a continuance on the grounds just stated. I told the court I thought those negotiations would be concluded within a week and would ask for a week's continuance. Mr. Gesas said the case had been tried very much in the newspapers; that statements were being made to the press, and he thought everybody should agree not to try their case in the press. I told the court I agreed with him and thereupon the court said the case would stand continued until whatever day the order of continuance was, and if there were any affidavits to be filed they should be served.

151 When I called the court's attention to the negotiations that would be concluded within a week I may have stated to the court that the rights of the complainant under his bill would not be affected in any way by allowing the application for the appointment of a receiver to go over for a matter of a week or ten days. As to who first broached the question of statu quo there that morning, I don't recall that the words "statu quo" were used, if they were it was in connection with keeping the matter out of the press. When I asked for a continuance Mr. Gesas may have said to the court that if a continuance were granted it should be upon a condition that the status quo be preserved. I don't recall that, but I would not say he did not say that.

I did not say on February 28th before Judge Sullivan that I had agreed before Judge Hebel that the statu quo should be preserved pending a continuance. I did state before Judge Sullivan, that if the records showed that that was my agreement I would abide by that statement. As to whether I then entered into an argument with Judge Sullivan and stated that my understanding of the statu quo was that I merely agreed to the preservation of the statu quo of that case, there was some colloquy about that subject before Judge Sullivan.

I don't recall whether when Mr. Gesas said that if that continuance was granted, it must be on condition that the statu quo be preserved, the court said that he would continue the matter on that understanding. I would not say the court didn't—I would not say one way or the other. I don't recall the conversation. Whether when the court announced that he would continue the matter with the understanding that the statu quo would be preserved, I assented to that understanding—I don't recall.

Mr. Johnston: I object. The witness did not say the court said that.

The Court: Q. Did you hear the court say that?

A. I don't recall the court having said that; there was a court reporter present at the time. I recall the following statement by me before Judge Hebel on February 16th. I think that was substantially what I said:

152 "The situation, if the court please, is this, without going into the merits of the bill, whether or not the bill sets up such grounds as would warrant this court in entering a Receivership; there are certain important matters now coming before the Board of Directors of this company, which involves some very large amount of finances, and which will be seriously interfered with, if this court undertakes to hear the application, for a Receivership. I think those negotiations will be concluded, within a week, and the rights of the complainant, under this bill will not be affected in any way at all by allowing this matter to go over for a matter of a week or ten days."

153 Thereupon the hearing of the above entitled case was continued to 2 P. M. April 20, 1925, and commencing on said last mentioned hour and day the following further proceedings were had.

LEONARD L. COWAN

Direct Examination Continued.

On leaving the court room of Judge Hebel on February 16th the next thing I did was to communicate by telephone with Mr. Byfeld, President of the company at his office in the Sherman Hotel, Chicago. I told him that the application for a receiver before Judge Hebel had been continued to the following Saturday. That is all I recollect at this time that I did tell him. He said that was good and that I would hear from him later in the afternoon. I think that was all of the conversation.

Next Mr. Byfeld, Mr. Frank Solomon, Mr. Valley Appel and myself met the afternoon of that same day in Mr. Byfeld's office and discussed the matter. Mr. Solomon was director and vice-president and Mr. Appel was a director of the company. Mr. Byfeld read to us a communication from Mr. Arthur Greene connected with some finance company to the effect that in view of that application for a receiver which had been made in the State Court he could no longer consider

application of the company for the financing of the company.

Mr. Johnston: Mr. Whitman understands, of course, that all this testimony is over my objection.

Mr. Whitman: I am perfectly willing to agree to that if the court desires to have it handled that way.

The Witness, Continuing: We discussed at that time the financial condition of the company. Mr. Byfeld also told us that Mr. Brown, one of the directors was in New York, and that he had a wire from Mr. Brown—that Mr. Brown was seeing some parties in New York about getting some finance for the company. That was the substance of the conversation.

154 There was nothing said at that conference that I recall about the disposition of the pending application in the State Court for the appointment of a receiver. I may have mentioned the fact that there had been a continuance, but nothing was said beyond that. As to whether anything was said at that conference regarding any other or further litigation being anticipated we discussed the fact that the Collector of Internal Revenue had issued a warrant against the company for unpaid Federal Taxes, and I think Mr. Solomon mentioned the fact that the Collector's man had been there that afternoon with a distress warrant, and that he had held them off for a few days. That is all I recall that was said with reference to the claim of the Internal Revenue Collector. There may have been something said about pay roll and pressing claims but I don't recall the details at this time. As to whether anything was said to the effect that other litigation might be anticipated in connection with such claims on which there was litigation pending; there was an unsatisfied judgment against the company, but I don't recall that anything in particular was said at the meeting that other litigation might be expected.

Nothing was said at that conference by any of the parties present as to whether or not any other, or further, or different litigation might be advantageous to the company. It was not suggested by any one at that conference that it would be desirable for the company to induce the institution of some other litigation, nor was anything said or any suggestion made that the affairs of the company should be taken up with any of its creditors. The name of the United States Worsted Sales Company was not mentioned.

The next time I talked about the affairs of the company

that I recall was the following afternoon, namely, Tuesday, February 17th, with a man by the name of Grand, a lawyer from St. Louis. Mr. Grand came to my office around noon or that afternoon. He came from St. Louis. He called on me in connection with the affairs of the company. He represented some stockholders. As to whether I know how he happened to call on me, he told me he had read in the
155 St. Louis newspapers of the application for a receiver in the State Court, and that his clients told him to come to Chicago, investigate the matter and see what needed to be done for their protection. That is all I know as to how he happened to call on me at that particular time. Who his stockholder clients were I don't recall; he himself was a stockholder. He also represented a Mr. Sherard or Gerard and Mark C. Steinpark of St. Louis, who is a broker or investment banker, they were stockholders.

When I talked with him at my office on the 17th just he and I were present. He asked me what was taking place in the State Court and I told him. He asked me a number of questions as to the condition of the company, all of which I answered as far as I could. I think we had lunch together that day and talked about it at lunch. We talked about the legal aspect of the State Court proceedings. I think I told him it looked as if the State Court had no jurisdiction—that was the substance of what passed between us on that subject. I don't think anything was said about any other litigation being instituted against the company. As to whether I discussed with him whether the institution of other litigation would be helpful in disposing of the State Court proceedings I think he told me that afternoon or the following morning that he might want to take some action to protect the interest of his own clients.

As to what next happened in the matter, Mr. Grand came back to me either later that day or the next day, February 18th, and told me he had been working on the question of filing a bill in the Federal Court. That was the first time I had heard anything of that kind discussed. He told me he intended to file a bill in behalf of his own clients as stockholders. Nothing was said about filing a bill on behalf of creditors. My recollection is this was late in the afternoon of February 17th.

156 Up to and including this last conversation late the afternoon of February 17th, 1925 I had taken the matter up with no one excepting Mr. Byfeld, Mr. Solomon, Mr. Appel

and this Mr. Grand. I had it up with Mr. Byfeld twice—first when I telephoned him and then when I met him with Mr. Solomon and Mr. Appel. My recollection is clear on that. I had it up with Mr. Solomon and Mr. Appel only at that time and I had it up the second time with Mr. Byfield, at Mr. Byfeld's office. My recollection is clear on that.

Next after the foregoing conversation with Mr. Grand late in the afternoon of February 17th, he came back to my office the same afternoon and told me he had been in consultation with the firm of Newman, Poppenhusen, Stern & Johnson to act with him in the matter. That was the first time the name of that firm or any member of it had been mentioned between Mr. Grand and me. As to whether he told me how he came to go to them I think he told me had at one time worked with Mr. Stern's brother in St. Louis. I think that was the only explanation he made.

Now I have told you all that I recall of my conversations with Mr. Grand on that day up to that time. I saw him again later on the same day in Mr. Frank Solomon's—in my office—and we discussed again what Mr. Grand—Mr. Grand was in town and what Mr. Grand was doing. Then I think a little later that afternoon Mr. Grand came to my office or called me up and asked me where he could meet Mr. Frank Solomon. I gave him Mr. Solomon's number. I think he came to my office and Mr. Solomon was at my office at that time, and Mr. Grand told us he was going to file a bill in the federal court in connection with Mr. Stern's firm. He explained that he wanted to see Mr. Frank Solomon because he wanted to know who the creditors of the company were—that he might want to include a creditor as complainant in his bill. I understood from him that he had known Mr. Solomon before that. Mr. Grand had been at a meeting of the stockholders of the company before that. He did not say anything about Mr. Solomon being peculiarly able to give him the name of a creditor—he said he would like to know from Mr. Solomon the names of the creditors of
157 the company. As to why he picked out Mr. Solomon as the source of his information, Mr. Solomon was in active charge of the business of the company. Mr. Byfeld, while he was president, was not in active charge of the business. I don't recall whether when Mr. Grand asked me over the phone where he could get hold of Mr. Solomon, he said he had already seen Mr. Solomon on this trip to Chicago.

As to what passed between Mr. Grand, Mr. Solomon and

me, when Mr. Grand came over to the office where Mr. Solomon and I were, Mr. Grand asked Mr. Solomon a number of questions about the financial condition of the company, who the creditors were, what the obligations were and asked Mr. Solomon if he knew a creditor who was not a resident. Mr. Solomon mentioned the United States Worsted Sales Company and they talked—Mr. Grand talked about wanting to file a bill in the Federal Court, and that it was better to have a creditor complainant; that the claim of the United States Worsted Sales Company was around $6,000. I think that—Mr. Solomon said he thought he could get hold of the Chicago representative of that concern.

Q. And induce them to file a bill?

A. Not induce them but introduce them to Mr. Grand.

Q. So that Mr. Grand could induce them to file a bill?

A. Mr. Grand wanted to meet him and know who he was.

When Mr. Solomon said he thought he could get hold of the Chicago representative of the United States Worsted Sales Company, Mr. Grand had already said in Mr. Solomon's presence that he wanted to get hold of a non-resident creditor of the Daniel Boone Woolen Mills, Inc., for the purpose of having such creditor join in the bill of complaint to be filed in the Federal Court, and it was after Mr. Grand made that explanation that Mr. Solomon said he thought he could get hold of the Chicago representative of the United States Worsted Sales Company. He did not say whether the 158 latter company or its Chicago representative was friendly with the Daniel Boone Woolen Mills, Inc., except that he said that he (Solomon) knew him very well. He did not say that he knew him well enough that he thought he would do what he asked him. He did not say that he thought he could give Mr. Grand an introduction that would enable Mr. Grand or make it easy for Mr. Grand to induce him—there was nothing said about that. The name of the Chicago representative was mentioned as Philipson.

We went out then at about five-thirty or six o'clock and arranged for dinner together. We went over to the LaSalle Hotel. This was either on Tuesday, the 17th, or Wednesday, the 18th—I forget now. The bill was filed the morning of the 19th. My attention being called to the fact that the bill was filed early on the morning of the 19th and that it was sworn to under date of the 18th, this occurrence then would be on Tuesday the 17th. I think it was Tuesday night. I went out to dinner with Mr. Grand and Mr. Solomon that

night of the 17th. Before we went out to dinner Mr. Solomon had phoned Mr. Philipson from the La Salle Hotel. As to whether I heard what Mr. Solomon said to Mr. Philipson over the telephone, Mr. Solomon told Mr. Philipson he wanted to see him and asked him to come down town. After a bit Mr. Philipson came down town.

As to what we told Mr. Philipson when he got there, Mr. Solomon introduced Mr. Philipson to Mr. Grand. Mr. Philipson got there in about an hour. Meanwhile I think we talked just generally about business matters.

Q. You did not discuss anything or decide upon whether you would have a stockholder?

A. I had nothing to decide about it; I was not a party to it.

Taking the matter up where Mr. Solomon introduced Mr. Philipson to Mr. Grand, Mr. Grand then had a discussion with him and told him what he wanted to do. Mr. Philipson was introduced to me also—I had not met him before. This was up in Mr. Grand's room; we had not had dinner at
159 that time but waited until Mr. Philipson came. As for telling you all the conversation there between Mr. Philipson, Mr. Solomon, Mr. Grand and myself, there was not any conversation in which I joined except to wait for Mr. Grand and Mr. Philipson. I was just there waiting for a dinner. I think Mr. Solomon and Mr. Grand explained to Mr. Philipson that he wanted a non-resident creditor to join in the suit against the Daniel Boone Woolen Mills, Inc.; that the law firm of Newman, Poppenhusen, Stern & Johnson were associated with Mr. Grand in what they were doing. Mr. Grand was telling what they were going to do—that they were going to file a bill in court. I think Mr. Philipson said that either he knew Mr. Stern or that Mr. Stern represented their company generally, and that he would go over and see Mr. Stern, and as far as I know he did go. At that interview he said he could not do it without authority from his New York office. Nothing was said as to the expense of the litigation. Nothing was said in my presence as to whether the United States Worsted Sales Company would pay any of the expenses. When Mr. Grand explained that Newman, Poppenhusen, Stern & Johnson were acting for him, he said nothing in my presence to indicate that Mr. Philipson would be expected to pay Newman, Poppenhusen, Stern & Johnson, and nothing was said as to the terms on which the claim of the United States Worsted Sales Company would be placed in either the

hands of Mr. Grand or Newman, Poppenhusen, Stern & John
son. I don't recall but when Mr. Philipson was introduce
to me I may have been identified to him as the attorney fo
the Daniel Boone Woolen Mills, Inc. Nothing was said whil
Mr. Philipson was there to indicate to him what the attitud
of the Daniel Boone Woolen Mills, Inc. would be toward thi
proposed suit. I don't know whether anything was said abou
the State Court proceedings—I may have told him there wa
a proceedings in the State Court. I don't know whether
told him at one time or another before the bill was filed i
the Federal Court. I cannot say whether any one told Mr
Philipson in my presence of the pendency of the proceeding
in the State Court—I cannot say positively I ever knew as t
that. As to whether Mr. Philipson and his company wer
160 induced to file this bill left by us in ignorance of the pend
ency of the litigation in the State Court, one of those at
torneys knew about that. They told me so in various con
versations we had both before and after the bill was filed.
could not say positively whether Mr. Philipson knew it o
not.

Before Mr. Philipson arrived at the hotel Mr. Grand tol
me he had already talked with Newman, Poppenhusen, Ster
& Johnson, and that they advised him that they were of th
opinion that it would be necessary to have a creditor in orde
to file a bill. I won't say they said it was necessary; I thin
the way he put it to me, it was advisable.

After Mr. Philipson arrived there was no discussion abou
whether under the bill to be filed by Mr. Grand an applica
tion was to be made for the appointment of a receiver. N
question of securing a receiver under the Federal Court bi
was discussed in my presence that night. As to whether i
fact in all my talks with Mr. Grand it was not discussed tha
he file a bill under which the appointment of a receiver coul
be had, well I assumed he was going to file such a bill an
ask the court to appoint a receiver. Not that tha' was th
only way to prevent the appointment of a receiver in th
State Court—that was not the idea. I assumed that his bi
would be a bill for the appointment of a receiver because
could not conceive of any other kind of a bill that he woul
want to file. He discussed with me his purpose in filing
bill—his purpose was to get a receiver appointed—that
what he told me.

As to whether either before or while, or after Mr. Philip
son was there that night I did discuss the question of whethe

Mr. Grand could secure the appointment of a receiver in the Federal Court without the consent of the defendant company, it was either that night or in the morning that Mr. Johnson

of the firm of Newman, Poppenhusen, Stern and John-
161 son told me he thought it would be necessary to secure

the consent of the defendant before the Federal Court would have power to appoint a receiver. He showed me—I think this was the following day—he showed me his bill of complaint that he proposed to file and asked me if we could make a denial of it. I told him as far as I knew the allegations of the bill were correct and we could not deny it, and if he filed it I would advise my client to consent to the appointment of a receiver. I say that was the following day—the day following the night of the 17th, that is that was on the 18th as I recollect it that I met Mr. Johnson and discussed the question of consent. Whether the bill was sworn to on the 18th I was not there when the bill was sworn to.

On the night of the 17th I stayed in Mr. Grand's room until about eight o'clock or maybe longer and then went to the dining room for dinner—spent about an hour there. Then I think we went to Mr. Johnson's office.

At Mr. Johnson's office there were Mr. Johnson, Mr. Grand, Mr. Solomon and myself. I don't think it was that night right after I got to Mr. Johnson's office that he told me the consent of the defendant company to the appointment of a receiver would be necessary. I think that question came up the next day. I dictated none of the bill of complaint. As to whether I was present when it was dictated Mr. Johnson did some work on it the night of the 18th in my presence. I did not actually talk to the stenographer but I may have made suggestions to him about the verbiage. I was there one-half to three-quarters of an hour, and when I left all the other gentlemen left including Mr. Johnson.

I returned to Mr. Johnson's office I think the afternoon of the next day. I think Mr. Johnson had the bill prepared. I read it over. I made no corrections and none of it was rewritten. It was not completely dictated the night before—I do think it was all dictated the night before except the prayer

for relief and process.
162 I think it was the afternoon of the 18th that I told Mr.

Johnston I would advise my client to admit the allegations of the bill. I first communicated my recommendation to Mr. Byfield to admit the allegations of the bill and to consent to the appointment of a receiver the afternoon of the

18th. I don't know whether that was before I went to Mr. Johnston's office or not. It was during the preparation of the bill and before its preparation was completed. There was not very much of the bill dictated the night of the 17th. Mr. Johnston was working on it when I got there and had not finished it when I left. Looking at the bill of complaint I cannot say what parts of it were dictated the night of the 17th. When I got there he had already started work on it. As to whether he had dictated the name of the complainant yet, yes I think so, but I am not sure as to that. Mr. Philipson did not take dinner with me that night, and I don't know whether between the time Mr. Philipson left the La Salle Hotel that night and the time I got to Mr. Johnston's office and Johnston had already dictated a part of the bill of complaint, Mr. Philipson had communicated with his home office or not.

The way I communicated with Mr. Byfeld on the 18th, I went to his office—this was the early part of the afternoon. I don't know whether it was before or after I had gone back to Mr. Johnston's office. Present in Mr. Byfeld's office were Mr. Byfeld, Mr. Solomon, Mr. Appel and myself. Mr. Appel and Mr. Solomon were there because we were to hold an Executive Committee meeting at that time—Mr. Solomon had arranged for that—when, I don't know. I first heard of it when Mr. Byfeld's office phoned me about fifteen minutes before I went over that there was to be a meeting and asked me to come. I didn't arrange with Mr. Soloman the night before that he should call such an Executive Committee meeting for the purpose of consenting to the appointment of
163 a receiver by the Federal Court. When Mr. Byfeld phoned me that was not the first I knew of such a meeting. We were holding Executive Committee meetings every afternoon at the time—this was just the routine of what we were doing right along.

As to what was said at the meeting about consenting to the appointment of a receiver in the Federal Court we were discussing the fact that a notice was served on Mr. Byfeld that an application for a receiver would be made, and then we discussed the question of consenting to it. I told them that if they could not deny the allegations of the bill I thought they should consent to the appointment of a receiver, especially in view of the fact that pay rolls had not been paid and claims were pressing, and it looked as though they could not save the company. That was substantially all that was

said. There was no discussion as to the effect of such an appointment of a receiver upon the proceedings in the State Court.

Then to notify Mr. Johnston I think I called him over the phone and told him the consent was forthcoming.

As to when after that I went to Mr. Johnston's office to complete the dictation of the bill, the bill had been completed by this time. After the night of the 17th, I was not in Mr. Johnston's office when he completed the dictation of the bill. He dictated nothing further on the bill in my presence on the 18th. As to whether then, excepting for one-half hour I was in Johnston's office the night of the 17th, I took no active part in the preparation of the bill, No, sir, I think I was there on the afternoon of the 18th. I am not sure of that. That was after the meeting of the Executive Committee now I think of it. When I went back there, of course, the bill of complaint had been completed. I told Mr. Johnston the night of the 17th that I would advise my clients to consent. The notice of the application in the Federal Court was served before the bill was filed.

164 As to whether I did any work in the matter beyond what I have told you on the afternoon or evening of the 18th, yes, sir I did. I called Mr. Johnston or he called me, and he said he would like to have me meet Judge Wilkerson that afternooon and we came over here that afternoon, the evening preceding the filing of the bill and saw Judge Wilkerson in his chambers after he left the bench. I don't think at that time I had prepared the answer to the bill. I think the answer was prepared the following morning. I am certain it was prepared in the morning—I prepared it. I prepared it after we came back from Judge Wilkerson's that afternoon and it was filed the next morning. The bill of complaint was completed some time before I went to the Federal Building with Mr. Johnston the afternoon of the 18th. I talked with Mr. Johnston on the telephone around four o'clock and arranged to meet him here about 4:30. It was around four o'clock that I first saw a complete draft of the bill. That was at Mr. Byfeld's office. It was served on us in Mr. Byfeld's office on the 18th before I came down to the Federal Building with Mr. Johnston. After I left the Federal Building and that same evening I dictated the answer and drafted the consent.

At no time from the time I was in court before Judge Hebel on the 16th until the receiver was appointed in this court was

there any discussion by me or by others in my presence of what liabilities the United States Worsted Sales Company was assuming or would be expected to assume as to the payment of expenses of litigation, attorneys' fees, or commission on their claim.

When Mr. Grand asked for information about a creditor I gave no instructions or advice to Mr. Solomon as to his assisting Mr. Grand to locate and pick out an available creditor for the purpose of filing a bill, but it has always been the policy of the company from the time Mr. Byfeld took it over to give any stockholder any information desired, and we
165 adhered to that policy at that time. I didn't remind Mr. Solomon of that policy in this immediate connection—it was not necessary.

Mr. Byfeld signed the consent to the appointment of a receiver in the Federal Court the morning of the 19th.

Cross-Examination by Mr. Johnston.

At the time I discussed with Mr. Appel, Mr. Byfeld and Mr. Solomon, constituting the Executive Committee of the Board of Directors of the Daniel Boone Woolen Mills, Inc. the matter of consenting to this proceeding, those gentlemen as the Executive Committee passed a resolution authorizing the President to consent to the appointment of a receiver. They were then the Executive Committee created by an action of the Board of Directors pursuant to the by-laws of the company vesting the Executive Committee with the powers of the Board when the Board was not in session.

Mr. Grand to whom I referred had been investigating the affairs of this company for several weeks and had been up to Chicago a number of times interviewing me and other members of the company. He had a considerable amount of data in his possession when he first came to me regarding the affairs of the company. He first came to Chicago in November when Mr. Byfeld became President. Mr. Grand knew in a general way everything that had been done in connection with the company when he came to my office, and asked me a number of questions, which I attempted to answer.

On the evening of the 17th when I was at Mr. Johnston's office about a half hour I took no part in the dictation of the bill of complaint and furnished none of the data upon which the bill was based. I saw in Mr. Johnston's possession the balance sheet of the company and the auditor's certified state-

ment and a memorandum prepared by Mr. Grand as to certain facts obtained as the result of his investigation.

166 At the time of the hearing before Judge Sullivan when the receivers in the State Court were appointed, Mr. Whitman was present representing the complainant and arguing for the appointment of a receiver—the same Mr. Whitman who is now representing the State Court receivers. Thereafter to my knowledge Mr. Whitman took an active part on behalf of the complainant in the proceedings in the State Court subsequent to the appointment of receivers. As to who represented the intervening petitioner in the State Court, Mr. Whitman did all the talking and apparently represented all of the moving parties asking for the appointment of a receiver.

At no time in the course of my conversations with Mr. Johnston or in the course of my conversations with Mr. Grand did I tell either of those gentlemen about any conversation I had had with Mr. Gesas in the State Court or any other attorney representing the complainant in said court. I never discussed with the complainant or any one representing the complainant in the Federal Court, either as agent or counsel, any facts concerning any conversations I had had in the presence of the State Court or with Mr. Gesas on February 16th. I think I told Mr. Johnston or Mr. Grand but I don't remember, that there had been a bill filed in the State Court, and that the motion for a receiver had been continued; that was the gist of the conversation and nothing further was said.

Redirect Examination by Mr. Whitman.

I told Mr. Johnston or Mr. Gesas why the motion for the appointment of a receiver in the State Court had been continued. What I told them was that I thought we had a chance to get $100,000 from the company Mr. Arthur Greene represented. I meant I told them that was why I made the motion for a continuation. As to whether I told them that was the grounds on which I had secured a continuance, I told them

that was why I asked for a continuance. I think I told 167 them what day the motion in the State Court was continued to. I don't know whether I told both Mr. Johnston and Mr. Grand that the motion was pending in the State Court. I think I told Mr. Grand but I am not sure I told Mr. Johnston. I told them why it had gone over and when it

was set to be heard. I didn't tell them that among other means of securing a continuance I had agreed to preserve the statu quo pending the continuance because I didn't understand I agreed to that.

Q. But so far as you did understand the situation, you told them there would be nothing done too then, didn't you?

A. I told them what had happened.

The reason I went to Mr. Johnston's office on the night of the 17th was that Mr. Grand asked me to. He asked if Mr. Solomon and I would go to Mr. Johnston's office—that perhaps Mr. Johnston might want some facts from us and we could answer some questions. As to whether Mr. Grand didn't think Mr. Johnston had all the facts yet, he said he might want some facts. At that time Mr. Grand knew of all these reports of the Auditors and what not that he had turned over to Mr. Johnston which I saw over there in Mr. Johnston's office when I got there. When he asked me to go over there and give them some further information I went. As to whether when I got there I found anything to do I think we discussed the affairs of the company in a general way. As to whether the affairs of the company included that the bill of complaint was to be filed and answered I think Mr. Johnston said something about what he was alleging in his bill, but he did not invite any expression from me as to the propriety, sufficiency or accuracy of his allegations, and I don't know why he told me of the allegations he was putting in the bill. He didn't explain to me or discuss it was me.

168 The resolution adopted by the Executive Committee was reduced to writing at the time of its adoption. It was put down in long hand and typewritten and put in the minute book of the company. Mr. Appel, Assistant Secretary wrote it out at the meeting. The Executive Committee convened at about 3:30 P. M. At that meeting I didn't examine the notice of the motion for the appointment of a receiver.

169 *Direct Examination by Mr. Whitman.*

My name is Fred Phillipson. I am selling agent in Chicago of the United States Worsted Sales Co. I have sat in court here and heard Mr. Cowan's testimony this afternoon.

The first I heard of anything touching the filing of such a bill is the bill of complaint in this case against the Daniel Boone Woolen Mills, Inc., was that I received a telephone call

from Mr. Frank Solomon. He asked me to come to the La Salle Hotel as soon as I could. He didn't explain what his business was. I went there the same evening and went to a room, the number of which Mr. Solomon had given me. There I met Mr. Solomon, Mr. Grand and Mr. Cowan.

To relate all the conversation: When I came into the room, I was introduced to Mr. Grand and Mr. Cowan. Mr. Grand and Mr. Cowan left the room, and Mr. Solomon said he wanted me to do him a favor. I said I would if I could. He said, the affairs of the Boone Woolen Mills were in bad shape, that they had a lot of rough work at the mill and couldn't get money to complete it, and that it was necessary to apply for a receiver, and that they wanted to apply for a receiver in the Federal Court for the conservation of assets for the benefit of creditors and stockholders. He says, "Will you sign a petition for me to do that?" I say, "I can't sign a petition, Frank, without authority from New York." "Well," he said, "Would you do it if you got it," because, as he said, it was for the benefit of creditors and stockholders; and I said, "You have to show me." Then he called Grand and

Grand came back into the room and told me that he was
170 an attorney from St. Louis, representing stockholders and told me about this thing, and that he thought it was the only thing to do so far as stockholders and also as far as creditors were concerned. Mr. Cowan then came into the room—I didn't know at that time who Mr. Cowan was—he wasn't in the room; I didn't know whether he was an attorney, but he represented the company. My conversation was with Solomon and Grand. They asked me if I would get in touch with New York, and I said I would. So I went downstairs and put in a long distance with New York, but couldn't reach my party. I tried again and again, and even after I got home about 10:30 or 11:00 o'clock, I couldn't reach them. I let it go then until the next morning, and then when I reached them (meaning New York) the next morning, they asked me what was the best thing to do. I said the best thing to do was to go ahead and apply for the receiver, and they said to go ahead and do whatever I thought was right, to handle it the way I would handle it for myself. Now that is the way I came into the case, and that that is the method which I applied for the receiver.

I couldn't reach New York that night, but that night I did go to Mr. Johnston's office with Mr. Grand, Mr. Cowan and

Mr. Solomon. There besides Mr. Johnston I saw his stenographer. What occurred was that I went in, met Mr. Johnston, shook hands with him. I had never seen him before. He was dictating this bill of complaint and asked me if he could use the name of the United States Worsted Sales Co. I said you can use it. If I get authority I'll sign it. Go ahead and use it if you want to, but if I don't get authority, I won't sign it. I was in Mr. Johnston's office just a few moments, then I left. The other gentlemen didn't leave with me; I left before them.

171 I didn't discuss with Solomon, Grand or Johnston the question of payment of expenses of the institution of proceedings in the name of the United States Worsted Sales Co. Nothing was said about that. No one asked me for any money for filing this or anything of the kind. I never received a bill for anything of the kind. I have never received any bill for services from Mr. Johnston's office in this matter. I never had any talk with anyone as to whether I was to receive a bill.

Nobody asked me to go over to Johnston's office. I forgot to tell you that when I came into the room I was talking to Mr. Soloman, Mr. Grand said that the thing to do was to apply for a receiver in the Federal Court, and he mentioned Newman, Poppenhusen, Stern and Johnston. Mr. Harry Stern of this firm was a personal intimate friend of mine, and I said I would like to talk with Stern before I called New York on the long distance. I got Harry Stern at his office and told him I would like to see him for about twenty minutes. He said, "Hurry over." I told Mr. Stern that I was in Mr. Frank Solomon's room and that Solomon was talking to me about the receiver of the Boone Woolen Mills, and I said to Mr. Stern, "Will you represent me if I go into this thing?" He said, "Certainly, why not?" Mr. Stern is a personal friend of mine, and he didn't say anything about the charges or anything else, and I didn't say anything about them, knowing that the charge would be all right, if any was to be made.

I don't recall whether Solomon or any of these other gentlemen explained to me how the Daniel Boone Woolen Mills, Inc. felt about having this bill filed for the appointment of a receiver. Nothing was said that night by anyone about the defendant company consenting to the appointment.

I signed the bill of complaint after reading it over.

172 JOSEPH BYFIELD, called by the State Court Receivers, being first duly sworn, testified as follows:

Direct Examination by Mr. Whitman.

As to whether I am president of the Boone Woolen Mills Company, well, I was. I have been present here in court, and I heard some of Mr. Cowan's and Mr. Phillipson's testimony.

I don't know exactly when I first heard of a proposed filing of a bill in the Federal Court for the appointment of a receiver for the Daniel Boone Woolen Mills, Inc., but judging from the conversation here, it must be around February 17th. I heard it by telephone through Mr. Cowan. He said Mr. Grand was here from St. Louis and was making application for a receiver in the United States Court. I said I hoped he would be successful. That was all that was said.

The next thing I heard was the next day, or the day after, i don't remember the dates exactly, but it was before the receiver was appointed in the Federal Court. I signed a written consent for the appointment of a receiver, I believe. I don't know how soon after Mr. Cowan first talked to me over the telephone that that was presented to me for signature. I don't remember whether it was the same day. I signed it in my office in the Hotel Sherman, possibly Mr. Solomon and Mr. Appel were present. This may have been at that executive meeting Mr. Cowan spoke of.

What I learned at that executive meeting was not the first word I had about the matter from the time Mr. Cowan telephoned me. I heard in the morning that an application was made. Then I heard afterwards that the receivership was appointed. The first I heard was from Mr. Cowan by telephone, telling me Mr. Grand was going to file an appli-
173 cation. Whether the next thing I heard was at this meeting of the executive committee, where the consent was brought up, I don't remember exactly whether the consent was brought up at that meeting, but we had a meeting where we passed the resolution consenting to the receivership. I don't remember exactly whether we adopted that resolution before or after I heard that the receiver had been appointed. I think it was after. After Mr. Cowan telephoned me Mr. Grand was here and was going to file a bill for a receiver, the next thing I heard about the matter was that the receiver was appointed. I don't remember whether I

heard that the receiver had been appointed before I signed the consent. Whether I signed the consent before or after the executive committee passed the resolution, I believe I signed it either after or at the time. As to whether any explanation was given me of what I was consenting to, the paper was an explanation. That was all that was said about it. I knew who was filing the bill. Mr. Solomon told me that the day the receiver was asked for, I mean the day the receiver was appointed.

When Mr. Cowan called me up and said Mr. Grand was applying for the appointment of a receiver, and I told him I hoped he would get it, I don't believe I told him why I hoped he would get it, I don't believe there was much of a conversation on the telephone. At that time I had already learned of the pendency of the case in the State Court, and that the motion in that court was pending for appointment of a receiver. I had told Mr. Cowan to oppose the appointment of a receiver in that case. When I told him I hoped Mr. Grand would succeed in getting a receiver, I didn't tell Mr. Cowan my reasons; I had told him by reason before. I had seen Mr. Cowan Monday after he came out of the State Court, in his office. Present: he and I. He told me the case was
174 put off until the following Saturday or Monday, I forgot which. That was about all that was said. I told him at that time I hoped there would be no receiver in the State Court. I said if there was going to be a receiver, I would like to see it in the United States Court. I don't remember what he said or whether he said he thought it might be possible. That was before Mr. Grand came to town. I didn't see Mr. Grand at all, while he was here. It was several days after I told Mr. Cowan I hoped there would be a receiver in the Federal Court that I heard Mr. Grand was in town. I may want to correct the statement that I told Cowan this on Monday, the 16th. I may have seen him on Saturday before the State receivership was applied for, on Saturday, when the notice of motion was served. I don't know whether I told him Saturday before he went to court or on Monday that I would like to see a Federal Court receivership. I didn't discuss with him whether the receivership in the Federal Court would prevent having a receivership in the State Court. I probably made several remarks as to why I preferred a Federal Court receiver. I told him I didn't like the character of the action in the State Court, on behalf of small stockholders, that these people should have come to me to see

whether it was necessary to apply for a receivership. I was at that time engaged in trying to bring the company out of its trouble and had arrangements partly made for a good sum of money from a merchants credit corporation, headed by Mr. Arthur Greene. I told Mr. Cowan that on Saturday and that I was afraid this action for a receiver would interfere with my efforts to finance the company and keep it going. I told him I didn't like the fact of their applying for a receiver without coming to me to find out whether it was necessary. When Mr. Grand came to make his application, he didn't come to me to find out whether it was necessary. Mr. Cowan didn't take up with me the advisability of a receiver in the Federal Court.

175 After the telephone message from Mr. Cowan, when I told him I hoped Mr. Grand would be successful, I didn't discuss the question of my consenting to the appointment of a receiver in the Federal Court at all. The paper was brought over to me to sign at the proper time and I signed it. I looked it over. I discussed whether I would sign it with my board of directors and my executive committee, and the committee adopted a resolution to consent. I didn't discuss it there at all.

I know Mr. Johnston, the gentleman here in court. Before the receiver was appointed in the Federal Court I didn't communicate with him at all about such a possibility. I believe I did communicate with one of the attorneys for the United Sales Worsted Sales Co. about the consent. Mr. Harry Stern telephoned me the 17th or 18th and told me his firm was going to represent Mr. Grand who represented stockholders in St. Louis, and that he wanted to know my attitude, whether I would object to their bringing suit. He asked whether I would consent to the appointment of a receiver, and I said I would. It was the day after that that the executive committee adopted its resolution. Apparently Mr. Appel and Mr. Solomon knew all about it. They had been talking about it at that time in my presence at that meeting.

As to whether I can remember anything further that was done, I remember the receiver was applied for and appointed, and that we were all glad that the receiver was appointed in the United States Court.

Mr. Stern said to me over the telephone that his firm was going to represent Mr. Grand. Whether he told me in whose name the bill was going to be filed, I don't remember. I

never knew the United States Worsted Sales Company, never heard of it. If they told me, I had forgotten it. I can't remember whether they said anything to me as to how they got the United States Worsted Sales Co.

176 *Cross-Examination by Mr. Johnston.*

In that conversation with Mr. Stern, he explained why he was calling me up. He said he and I had conferred before on the matter, he representing a firm that would like to have come into the Boone Picture, as they say, and that negotiations were still on. I had given Mr. Stern certain information about the Boone Picture. That in view of the fact that I had given him that information, he didn't want to take any action, that he would influence that client not to take any action unless it was entirely agreeable to me, that unless I were willing he would not use the information he had.

As to whether this talk I had with Mr. Cowan about the receivership in the Federal Court was before or after a receiver had been actually applied for in the State Court, if my memory is correct, I mentioned it to Mr. Cowan at one time before a receiver was applied for, that I was wondering if it was necessary for the protection of stockholders to have a receiver, and if in that case we could get a receiver in the United States Court. That was some time before the bill was filed in the State Court. I told Mr. Cowan at that time that if a receivership should be necessary, I would by all means prefer one in the United States Court to one in the State Court. Then I think the matter was dropped because he said he didn't think there would be a receiver because the company was solvent and there was no occasion for a receivership. I next discussed the subject after the receiver was applied for. I said it was a misfortune to this company that a receiver was applied for in the State Court. It was several days
177 after that Saturday that I first heard about the application for a receiver in the United States Court.

The executive committee's resolution authorizing consent to the appointment of a receiver was adopted before I signed the written consent. That written consent to which I refer is the answer of the Daniel Boone Woolen Mills, Inc., filed in this court cause.

Redirect Examination by Mr. Whitman.

It is not a fact that for some time prior to the application for appointment of a receiver to the State Court Mr. Cowan had standing orders from me that if there was to be a receiver, he should get it in the Federal Court. I don't remember exactly when I first told him that, but it was sometime when we discussed various matters, and I asked him whether in a case of necessity, we are pressed very hard, because of the number of law suits that were threatened—and I said I am in despair, I don't knows what I was going to do, if these law suits are going to be pressed, it may be necessary for a receiver to be appointed, and I said if a receiver is to be appointed, I would like to have the receiver appointed in the United States court, not in the State Court. I was talking as president of the Daniel Boone Woolen Mills, Inc., but in a general way, and I was talking to Mr. Cowan as attorney for the company. As to whether I ever gave him any different orders from that, I didn't give him any orders at all.

Later on, there was an application for the appointment of a receiver in the State Court. The matter came up the following Monday in the State Court. Mr. Cowan reported to me that Monday that he had been in court. After I got the notice on Saturady that on Monday somebody was going to apply for the appointment of a receiver and before Mr. Cowan went into court that Monday morning, I didn't talk with Mr. Cowan about whether I preferred a State 178 or Federal Court receiver. When he came back from court on Monday, he telephoned me that the matter was put off.

Q. What was it you said?

A. I told him—he was anxious to get the matter put off a week.

Q. What was said to him over the telephone; what did you say about preferring a Federal Court receiver.

Mr. Johnston: He didn't say anything to him.

Mr. Whitman: I object to counsel doing that; you are too much of a lawyer, Mr. Johnston, to sit there and tell the witness what the answer is.

Mr. Johnston: I object to counsel putting something in the witness' mouth.

The Court: Read the question. (The question read.)

The Court: I don't understand the question.

The Witness: That question didn't come up at that time.
Mr. Whitman: Q. When next did it come up?
A. I don't remember. I think it came up Friday.
Now that was Monday when it did not come up. It did not come up later that day. I don't believe it came up the next day, Tuesday. I don't remember whether it came up the next day, Wednesday. As to whether it came up the next day, Thursday, well it came up on the day when the application was made for the Federal Receiver, but I don't remember what day that was.

Mr. Whitman then stated that the Court Reporter Cleary reported the proceedings in the State Court before Judge Hebel on February 16th, that Mr. Whitman had a transcript of Mr. Cleary's notes and that he would like to be permitted to put that transcript into the record instead of calling the court reporter to the stand, and Mr. Johnston stated that he would not insist upon Mr. Cleary's being called, if Mr. Cleary would certify and affix his affidavit to the tran-
179 script. Thereupon it was stipulated between counsel that Mr. Johnston's objection should stand to Mr. Cleary's testimony so to be shown, that the same was incompetent, immaterial and irrelevant as not pertaining to any of the issues raised in the case, particularly as to and against the complainant. Thereupon said transcript was marked "Exhibit 10." The same is presented supra.

Thereupon, a recess for five minutes was taken to await the arrival of Mr. Frank Solomon.

FRANK SOLOMON, called by the State Court receivers, being first duly sworn, testified as follows:

Direct Examination by Mr. Whitman.

I am vice-president of the Daniel Boone Woolen Mills, Inc., and know of the filing of the bill of complaint in this court for and appointment of a receiver for the Daniel Boone Woolen Mills, Inc., I know Mr. Leonard L. Cowan and Mr. Grand, a lawyer, and Mr. Phillipson from the United States Worsted Sales Co. Along in February I heard of a motion being made in the State Court for the appointment of a receiver, and that that motion was continued. I learned of the making of that

motion from the attorney who served me with notice of the same on a Saturday. I was not in court when the motion was made. I don't recall from whom first I heard in the matter after the motion was made, but it was from either Mr. Cowan or Mr. Byfield. One or the other of them told me that the motion had been made and continued.

The first conversation or communication I had with anybody about the filing of a bill for receiver in the Federal Court was with either Mr. Byfield or Mr. Cowan, and was the same afternoon after I heard that the motion had been made in the State Court and continued. The motion came up 180 in the State Court in the morning and I was told in the afternoon that it had been presented. When I had this first communication or talk with either Byfield or Cowan about the proceeding in the Federal Court, I was in Mr. Byfield's office, and Mr. Byfield and Mr. Appel, Mr. Cowan and I were present. I don't remember exactly what was said. As right as I can remember we had a general discussion regarding the affairs of the company and the necessity of a receivership. Somebody said that under all the circumstances a receivership was necessary. As to who said that, we all agreed to that. There was discussion as to whether that needed receivership should or might be a State Court receivership. What was said about that, as I remember, was that we all agreed it would be for the best interest of the company to have a Federal receiver, in equity, rather than a State Court receiver. Mr. Cowan, as near as I remember, said that in a receivership in equity in the Federal Court there would be no possibility of any bankruptcy proceedings, whereas in the case of a State Court bill there was such a possibility; that they might bring about a bankruptcy proceeding. He said a bankruptcy proceeding was undesirable, and we all agreed to that.

There was talk at this meeting of whether the company and its officers should take action in view of the circumstances. What was said was that we all agreed that we should take steps in order to obtain a receiver in equity in the Federal Court. There was something said as to what steps should be taken. It is difficult to remember when there were four men in the room several months ago just exactly what each one said, but as I remember I suggested that in view of the fact that it would be necessary to have an out of town stockholder file the bill in the Federal Court, we should com-

municate with Mr. Grand of St. Louis who represented
181 stockholders down there relative to the possibility of having a bill filed in the Federal Court. The way I learned that I would have to have an out of town stockholder was that Mr. Cowan informed me of that. He said there would have to be a diversity of citizenship. After I suggested Mr. Grand, we agreed that was the thing to do and set about to do it. It was agreed that Mr. Cowan should do it, that he was to telephone Mr. Grand. Nothing else was said as to what further steps should be taken as I remember at this time. It was said that Mr. Cowan should telephone immediately. He telephoned right from there in my presence. I heard what he said over the telephone. Mr. Grand was out of the city on his way to Chicago at the time. That was all that I got. Nothing further was said at that meeting that I recall. W left with the understanding that we were to meet again and that Mr. Cowan was to let us know when Mr. Grand got to Chicago; that we were to communicate with each other the following day. When I say that Mr. Grand was out of town and on his way to Chicago, I mean Cowan said that that was what was told him over the telephone wire when he got Mr. Grand's office on the wire. Mr. Cowan said he was told that Mr. Grand was in Decatur and was coming to Chicago before he returned to St. Louis. As I remember it, Mr. Grand's office didn't known exactly where Mr. Grand would be stopping. We discussed how we were to get in touch with Grand the next day. On previous trips to Chicago, Mr. Grand had stopped at the Sherman House, and we presumed he would be there.

The next thing that occurred, to my knowledge, in the taking of the steps to get this Federal Court receivership was that the following afternoon I spoke to Mr. Cowan. I called
him up and he told me Mr. Grand had arrived, and had
182 come to his office. At our meeting we had arranged to leave word at the Sherman House for Grand. I don't know who attended to it. We simply telephoned down to the desk. When I telephoned and Cowan told me Grand was in town, that was all that was said at the time, as I remember.

My next communication with anybody was that sometime during the course of the afternoon, either Mr. Cowan or Mr. Grand telephoned me and asked me about what attorney they should use here in Chicago, that Mr. Grand had several correspondents here and wanted to know whether I had any preference. He named over the names of attorneys and I

told him I preferred Mr. Harry Stern of Newman, Poppenhusen, Stern & Johnston. That was all of the conversation.

My next communication in the matter was about 5:00 o'clock that afternoon, Mr. Cowan telephoned me and asked me to come downtown. I came down and met him at the La Salle Hotel. That was when I met Mr. Grand. I went up to Mr. Grand's room. Mr. Cowan and Mr. Grand told me that Mr. Stern had suggested that the bill which should be filed should be a creditor's bill and not a stockholder's bill. They asked me the names of creditors who had claims of over $3,000.00 who might be willing to file a creditor's bill. They asked what I could remember out of my head, I didn't have the records with me. I think I did have the records with me. I ran over the records with them and picked out the names. It was said that the creditor was to be a non-resident. I picked out two names, Mr. Charles D. DeLee and Mr. Fred. Phillipson. Fred Phillipson was the Chicago representative of the United States Worsted Sales Co. There wasn't much of a question of Mr. Cowan's and Mr. Grand's approving my selection. After the two names had been mentioned, the next thing that occurred was that I telephoned 183 to Mr. Stern, right from the room there, and told him I thought he knew both of these gentlemen and suggested his getting in touch with them. He said he couldn't consider doing any such a thing, that it was against the ethics of a legal profession for a lawyer to solicit a claim and that he was in no way interested in getting in touch.

The next thing that happened, I called up Fred Phillipson. I don't remember whether we discussed it or not, or whether I simply went out and called him on the 'phone. I asked him to come downtown and meet us. That was the substance of the conversation.

Nothing further occurred until Phillipson came downtown. We simply sat around. When he got there, we had a further talk with him. We didn't all four stay in the room while I talked to Phillipson. Mr. Cowan and Mr. Grand left the room. I suggested beforehand to them that they do so. My conversation with Mr. Phillipson was I explained the position of the Boone Woolen Mills, that we had plenty of assets to take care of the creditors, that we were shy of working capital, and as a result we weren't able to meet our payroll, that in order to protect the interests of the company, we would like to have the claim—I would like to have his claim to turn over to Mr. Harry Stern for the protection of the company and creditors and stockholders of the Boone Woolen Mills.

In substance that is all I said to him. I told him for the purpose of having a receiver appointed in the Federal Court. I don't remember whether I told him there was an application pending for the appointment of a receiver in the State Court. I think I told him one had been filed. I don't think I explained to him the disadvantage of the one that was pending in the State Court was that it might result in a bankruptcy proceeding. As to what he said, the first thing was
that he couldn't do anything without consulting New
184 York, that in view of my asking him to do so, he would
be willing to do so, providing he got the consent of his home office in New York; furthermore that in doing it, he had implicit confidence in turning his claim over to Mr. Harry Stern.

As to whether anything was said in this conversation with Phillipson as to whether the United States Worsted Sales Co. would be subject to any expense for court costs or attorneys' fees, I remember that question came up. Just how, I can't say. Nothing was said as to whether the claim would be taken by Mr. Stern on a collection basis, or on a per diem basis. I don't think the question of whether the United States Worsted Sales Co. would be called upon to pay a collection fee for the collection of their claim came up at all in our conversation. I really don't remember in what way the question of expense and attorneys' fees came up. We discussed it, and I can't possibly remember in just what way the thing came up. The statement was made to Mr. Phillipson somewhere along the road that there would be no expense to his company involved, whether that was made by me personally or by someone else, I don't recall.

After this conversation I had separately with Mr. Phillipson I called Mr. Grand and Mr. Cowan back into the room, and advised them what Phillipson said. I don't remember whether it was after Mr. Cowan and Mr. Grand came back into the room that the question of Phillipson's company's expense or attorneys fees came up. It came up there that night sometime in the course of the evening. I wouldn't even be certain as to whether it came up before he telephoned his home office, so that he would know what to tell his home office
on the subject. It is possible that the question may have
185 been raised by his home office and that he afterwards
took it up with me, because I am not at all clear in my mind just how that conversation came up. He wasn't able to get his home office that night.

Then Cowan, Grand, Phillipson and I went over to Mr.

Stern's office. There we saw Mr. Johnston. We were there from one-half hour to an hour. Phillipson was the first one to leave. Now, I don't recall whether he left first or not. Mr. Cowan, Mr. Grand and I left together. What we did while we were there was that Mr. Johnston asked me questions relative to the indebtedness of the Boone Company, and I answered him and gave him the facts. There was also a general discussion relative to the various phases of the Boone situation. The question of the necessity of the consent in order to get the receiver appointed in the Federal Court and of arrangements about getting the consent came up the next morning. After I gave Mr. Johnston the answers to his questions he didn't dictate them to a stenographer. There was no stenographer there at the time. I saw a stenographer there that night, but that was when we came back from supper. We went back to Johnston's office the second time that night after supper—Mr. Cowan, Mr. Grand and I. That time we stayed a couple of hours. We all left together. During those two hours the dictation of the bill of complaint was going on. Yes, Mr. Johnston was dictating the bill of complaint then. I was not supplying him with the data as he went along. He had the data. I was not contributing anything during those two hours, just sitting there. Mr. Grand contributed nothing. As to whether there was any discussion between Mr. Johnston, Grand and Cowan as to the form of the bill or the necessity of different allegations, there was a general discussion all the way through.
186 As to whether those three lawyers in my presence were getting out the bill of complaint, Mr. Johnston was getting it out. As to whether he asked questions of the other lawyers or they volunteered advice, they made statements one time or another as they went along, just as I did.

Thereupon an adjournment was taken to 9:00 A. M. April 21st, 1925, at which latter hour and date the proceeding continued, as follows:

FRANK SOLOMON:

Direct Examination by Mr. Whitman continued.

I didn't hear Mr. Cowan and Mr Byfield, or Mr. Phillipson testify in this matter here before his Honor Judge Wilkerson. I came into the court room yesterday just shortly before I took the stand.

Next after leaving Mr. Johnston's office on the night of the 17th, I came into contact with these parties when, on the following day, just what hour I don't recall, but I think about noon, I met Mr. Cowan and Mr. Grand in Mr. Grand's room, and we had lunch together. We discussed the proposed suit and the progress of the work on it, but so far as I remember there was nothing discussed that hadn't been discussed before. The way I happened to go there was Mr. Grand was here from St. Louis and I met him downtown for lunch and to see whether there were any phases that we might want to discuss. I was told then that the bill was in Mr. Stern's office, that it was simply a question of getting it ready for filing.

I first learned that Mr. Phillipson had succeeded in reaching his home office when I called Phillipson up by 'phone early that morning. I simply asked him whether he had been able to reach his home office and he said that he had and that they were satisfied to have him do anything that he might deem for their best interest, and I hung up the receiver.

187 I probably then passed the word along to somebody else that I had heard from Phillipson, that it was all right, but I don't recall whether I did or not. I was having all the dealings with Phillipson. I don't remember whether I telephoned to Mr. Cowan and told him about it. I did one or the other, and I simply told him that Phillipson had been given instructions by his home office to proceed in any manner he saw fit.

I have given you the substance of what occurred relative to the matter at luncheon that noon. As to when the matter next came to my attention, well, we were together pretty much. Mr. Cowan and I were pretty much together that day. From luncheon I went back to Mr. Cowan's office. There we sat around and talked a while, waiting to hear as to when Mr. Johnston's office was going to file the bill. That afternoon, we arranged for a meeting of the executive committee that afternoon.

When the notice of motion in the Federal Court for the appointment of a receiver was served, I was in Mr. Byfield's office. I personally signed the consent to the appointment of a receiver, whether that afternoon or early the following morning, I am not certain when I signed it, I was in Mr. Byfield's office. I was in Mr. Byfield's office, that afternoon, and I was back there again the next morning. I don't know

who prepared the consent, I may be mistaken as to my signing the consent, perhaps what I signed was the resolution authorizing the consent. I signed something. Things were going fast and furious at that particular time.

Cross-Examination by Mr. Johnston.

At the meeting on February 18th, 1925, in Byfield's office a resolution was adopted by the executive committee, approving the action of the company's officers in consenting to the appointment of a receiver in the Federal Court.

188 In the conversation, I say it was on the night of the 17th, it is a fact that you, Mr. Johnston, made a statement to the gentlemen there assembled that if a bill was filed and a receiver appointed in the Federal Court, the Federal Court in due course would make a reasonable allowance to the complainant's solicitors for the cost of filing and preparing and filing the bill. That is the statement that was made. As to whether that was the only statement that was made respecting the cost and expense incident to this litigation, so far as Mr. Phillipson or his company was concerned, I'm not certain as to that. That is that only statement that was made in your office, Mr. Johnston, I recall no other statement that was made in your office. As to whether I recall any statement elsewhere, sometime or other in my conversations with Mr. Phillipson, he brought up the question of expense to him. In just what way he brought it up, I can't recall. Neither I nor any other officer of the Daniel Boone Woolen Mills, Inc., ever said to Mr. Phillipson, or anyone representing the complainant in this case, that the Boone Woolen Mills would pay any part of the cost or expense of this litigation.

After the meeting in which I first talked with Mr. Phillipson, and after I talked with him, Mr. Phillipson called up Mr. Stern. He told Mr. Stern over the 'phone about being with me, and that he was perfectly willing, because of his friendship for and confidence in Mr. Stern to have Mr. Stern handle anything he might have; that he would be glad to turn over his claim to Mr. Stern in the matter, if he could, but that he couldn't without getting the consent of his home office, and that as soon as he got that he would communicate with Mr. Stern further.

189 In the preparation of the bill that evening, when I was in your, Mr. Johnston's office, no one outside of yourself

had anything to do with dictating or preparing the bill, except in making suggestions concerning it and giving you facts and figures. Practically all the bill was dictated while we were out to dinner.

Redirect Examination by Mr. Whitman.

When Mr. Johnston told Mr. Phillipson in my presence that if a receiver was appointed in the Federal Court that the court in due course would make allowance to the complainant or the complainant's solicitor, Mr. Johnston didn't say anything about what Mr. Phillipson was to pay in the event that the Federal Court didn't appoint a receiver and didn't make such an allowance. Mr. Johnston didn't say to Mr. Phillipson that if no such allowance was made, Mr. Phillipson or his company would have to pay a fee.

When Mr. Phillipson brought up the question of expense to him or his company, I don't think either Mr. Cowan or I said to Mr. Phillipson in words or in substance that he or his company would not be put to any expense. What reply was made to Phillipson, I don't recall. I told you yesterday afternoon I couldn't recall just how this question of expense came up with Mr. Phillipson, or whether or not he simply remarked that, somewhere along the line. Mr. Phillipson asked about the question of expense to his company, but I don't know what reply anybody made; just how the thing was handled, I don't know approximately how it was handled. As to whether I know further about it is that I did hear Mr. Johnston explain to Phillipson that if a receiver was appointed the court would allow the expenses out of the assets of the Boone Woolen Mills, Inc., not the expenses. As to complainant's fees, he didn't say anything about complainant's fees. He simply said the court would allow a rea-
190 sonable fee to the attorneys for filing the bill. That is the only answer or the only further discussion of the matter of expenses to Phillipson or his company that I can remember after Phillipson's inquiry about it. I didn't take up with Mr. Stern or Mr. Johnston the question of expense to Phillipson or his firm after Mr. Phillipson made that inquiry.

The complainant and the Federal Court receiver, through their respective counsel, suggested that any further showing of facts they might wish to make they would make by affidavit, and the court directed such affidavits, if any, be served

on or before the 24th, and that counsel for the State Court receivers file reply affidavits, if any, on or before April 27th, and thereupon, the matter was continued to 10:00 A. M. May 4th, 1925.

Thereafter, complainant, upon due notice as above provided for, presented and filed, pursuant to leave, as aforesaid, the affidavit of Edward R. Johnston, in words and figures as follows:

191 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

United States Worsted Sales Company, a corporation, *Plaintiff*, *vs.* Daniel Boone Woolen Mills, Inc., a corporation, *Defendant*. } Equity No. 4660

United States of America
Northern District of Illinois } ss.
Eastern Division

EDWARD R. JOHNSTON, being first duly sworn, on oath deposes and says:

1. That affiant is an attorney practicing law in the City of Chicago, County of Cook, State of Illinois, and is a member of the law firm of Newman, Poppenhusen, Stern & Johnston; that on the 17th day of February, A. D. 1925, the firm of Newman, Poppenhusen, Stern & Johnston was employed by the United States Worsted Sales Co. to prepare and file the bill of complaint herein in the United States District Court for the Northern District of Illinois; that affiant prepared said bill of complaint from information, most of which had been in the possession of affiant for more than thirty days prior to the preparation of said bill, and on the 19th day of February, 1925 filed said bill of complaint with the Clerk of the United States District Court for the Northern District of Illinois, and appeared before the Honorable James

H. Wilkerson, one of the judges of said court, and moved for the appointment of a receiver for the Daniel Boone
192 Woolen Mills, Inc. upon said sworn bill of complaint and the answer of the defendant filed thereto.

2. That at the time of the preparation and filing of said bill of complaint the complainant and the solicitors for the complainant had no knowledge or information concerning the bill of complaint filed by one Harry Hurwitz against Daniel Boone Woolen Mills, Inc., in the Superior Court of Cook County, Illinois, or concerning any proceedings which had taken place in said court, save and except such facts as were disclosed by the record in said court, to-wit that on the 14th day of February, 1925 one Harry Hurwitz, claiming to be the holder and owner of one hundred shares of the common stock of Daniel Boone Woolen Mills, Inc., had filed his certain bill of complaint against Daniel Boone Woolen Mills, Inc. in the Superior Court of Cook County; that on the 16th day of February, 1925 application had been made by the solicitors for said Harry Hurwitz for the appointment of a receiver for Daniel Boone Woolen Mills, Inc., by said court upon said bill of complaint, and that the hearing upon said motion had been continued by said court to the 21st day of February, 1925.

3. That upon presenting to the Honorable James H. Wilkerson, one of the judges of this court, the motion of the complainant herein for the appointment of a receiver, affiant, as one of the solicitors for said complainant, disclosed to the said Honorable James H. Wilkerson all of the facts known to the complainant and its solictors, to-wit, the fact of the filing of said bill in the Superior Court of Cook County by said Harry Hurwitz, the general character and nature of said bill, the fact that a motion had been made thereon for the
193 appointment of a receiver, and that said motion had been continued for hearing until the 21st day of February, 1925.

4. That, as appears from the allegations of the bill of complaint herein, Daniel Boone Woolen Mills, Inc., at the time of the filing of the bill of complaint herein, owned certain real and personal property located at Baltic, Connecticut; that subsequent to the filing of the bill of complaint herein and the appointment of a receiver by the United States District Court for the Northern District of Illinois for said Daniel Boone Woolen Mills, Inc., the solicitors for United States Worsted Sales Co., complainant, prepared and filed in the United States District Court for the District of Connecti-

cut an ancillary bill for the appointment of a receiver for the Daniel Boone Woolen Mills, Inc. in that district, and on the 21st day of February, A. D. 1925, the United States District Court for the District of Connecticut duly appointed Thomas J. Spellacy and Edward J. Brundage ancillary receivers of the Daniel Boone Woolen Mills, Inc. in and for the District of Connecticut, and said receivers duly qualified and are now acting as ancillary receivers of said Daniel Boone Woolen Mills, Inc. in said district.

5. That, as appears from the allegations of the bill of complaint herein, said Daniel Boone Woolen Mills, Inc., at the time of the filing of said bill of complaint, owned certain personal property located at Davenport in the State of Iowa; that subsequent to the filing of the bill of complaint herein the solicitors for said United States Worsted Sales Company, complainant, prepared and filed a bill for the appointment of an ancillary receiver for the Daniel Boone Woolen Mills,
194 Inc. in the District Court of the United States for the Southern District of Iowa, and on the 12th day of March, 1925 A. G. Bush of Davenport, Iowa was duly appointed by the District Court of said District ancillary receiver of the Daniel Boone Woolen Mills, Inc. in the Southern District of Iowa, and has duly qualified and is now acting as such receiver.

6. That on the date of the filing of the bill of complaint in the Superior Court of Cook County, Illinois, by said Harry Hurwitz the market value of the capital stock of said Daniel Boone Woolen Mills, Inc., as appears from the quotations upon the New York Stock Exchange on said date was four and one-eighth dollars per share.

(Signed) EDWARD R. JOHNSTON.

Subscribed and sworn to before me this 23rd day of April, A. D. 1925.

Notary Public.

195 Thereafter, pursuant to adjournment, the matter came on further at 10:00 A. M. May 4th, 1925, and the court heard arguments of counsel, in the course of which arguments said Leonard L. Cowan stated, among other things:

The Court: Mr. Cowan, what has the defendant to offer? Have you any evidence that you want to produce.

Mr. Cowan: Your honor I have not. We are in a peculiar position with respect to the defendant corporation, it is true,

but one of its officers is in California, one in New York and there is no one here to whom we can refer matters. I am not sure at the present time whether or not we have a client. Therefore, I do not want to produce any witnesses or introduce any evidence at this time.

The Court: All right.

Which was all of the evidence offered and adduced or received upon said hearing and trial.

196 State of Illinois } ss.
County of Cook }

IN THE SUPERIOR COURT OF COOK COUNTY

In Chancery.

Harry Hurwitz,
Complainant,
vs.
Boone Woolen Mills Inc.,
Defendant.
} No. 415641

BILL OF COMPLAINT.

To the Honorable Judges of the Superior Court of Cook County, in the State of Illinois, in Chancery Sitting:

1. Your orator, Harry Hurwitz, a citizen and resident of Chicago, Cook County, State of Illinois, respectfully represents unto Your Honors that he is a stockholder of the defendant, Boone Woolen Mills, Inc., a corporation, duly organized and existing under and by virtue of the laws of the State of Illinois, with its general office and place of business in the City of Chicago, and that he brings this suit in his own behalf and that all other stockholders of said corporation, and other persons, firms or corporations who may be interested in this litigation and who may seek to intervene or contribute to the expense thereof; and shows that on January 22nd, 1924, he purchased in the open market 100 shares of the common stock of the said Boone Woolen Mills
197 Inc., paying therefor the sum of $36.00 per share, or a total sum of $3600.00, and that shortly thereafter the said Boone Woolen Mills, Inc., caused its certificate of stock No. T-C-2105 to be issued to your orator for said shares, and

that your orator is now and has since the date of such purchase been the sole owner of the said stock, and that no one except your orator had any interest therein.

2. That the Boone Woolen Mills, Inc., which is hereby made party defendant to this, your orator's Bill of Complaint, was incorporated under the laws of the State of Illinois on the 30th day of September, 1919, and became fully licensed and qualified to do business by having its charter granted to it by the Secretary of State of the State of Illinois, and by further having the said charter recorded in the Recorder's Office of Cook County, that being the county wherein said defendant corporation has been maintaining, from its inception to the present date, its principal place of business; that the said defendant corporation has been licensed to engage in the manufacture of woolens and other fabrics, and particularly in the manufacture and sale of men's clothing; that in addition to maintaing its principal place of business in Chicago, Illinois, and within this jurisdiction, the said defendant corporation also owns and operates plants at Moline and Rock Island, Illinois, Davenport, Iowa, and Baltic, Connecticut.

3. That the authorized capital of said Boone Woolen Mills, Inc., was, at the date of its incorporation, $400,000.00, represented by 4,000 shares of preferred stock of the par value of $100.00 per share, and 10,000 shares of common 198 stock of no par value; that such authorized stock was increased on August 16, 1921, to $1,225,000.00, consisting of 6,000 shares of preferred stock of the par value of $100.00 per share, and 25,000 shares of common stock of the par value of $25.00 per share; that such authorized capital stock was, on May 3, 1922, reclassified and said preferred stock was cancelled and in lieu thereof said common stock was increased to 49,000 shares of the par value of $25.00 per share, aggregating $1,225,000.00; that such authorized common stock was further increased on January 29, 1923, to $3,125,000.00, consisting of 125,000 shares of common stock of the par value of $25.00 per share; that such authorized common stock was further increased on November 20, 1923, to $6,250,000.00, consisting of 250,000 shares of common stock of the par value of $25.00 per share, of which 187,500 shares aggregating $4,287,500.00 of said common stock is now outstanding.

4. Your orator further represents that on or about the 14th day of November, 1924, the Directors and Officers then in charge of the business of said defendant corporation, were

ousted and were compelled to resign as officers and directors of said corporation; that at this time the names of all of said officers and directors are unknown to your orator, but when they are discovered or otherwise ascertained your orator prays leave to make said parties party defendant to this, your orator's Bill of Complaint; and on information and belief he charges the fact to be that on said 14th day of November, 1924, it was discovered that said officers and directors had for a long period of time prior to the said 14th day of November, 1924, so mismanaged the business affairs and assets of said corporation that by reason thereof there was a deficit in such assets of a sum exceeding $2,000,000.00, and he is informed and believes and therefore states the fact to be that it appeared that the said officers and directors caused various statements to be made to the Chicago Stock Exchange, the New York Stock Exchange, Securities Division of the office of the Secretary of State of the State of Illinois and elsewhere that the stock in said corporation sold to the public was intrinsically more valuable than it actually was, and that by reason of such misstatements and false representations the said officers and directors of said corporation were enabled to place said shares of stock for sale on the said stock exchanges of Chicago and New York, and to sell the same to the general public in an amount aggregating more than $3,000,000.00.

5. That on the said 14th day of November, 1924, one Joseph Byfield of the City of Chicago, together with a number of other persons were elected Directors of said corporation, the names of said persons being at present unknown to your orator, and thereupon the said Byfield was elected President of said corporation and he and said associate directors thereupon assumed to reestablish the business of the defendant corporation with a view of so operating said corporation as to produce a profit; that shortly after the said Joseph Byfield assumed possession and control as such President, and through the Board of Directors so dominated by him, he represented that he discovered that certain of the former officers and directors of the defendant corporation had within a very short time prior to their resignations withdrawn approximately the sum of $100,000.00 for and on account of an alleged payment of an existing debt, whereas it is claimed that no such debt existed and the said Joseph Byfield thereafter instituted an action in the name of the said defendant corporation in the attempted endeavor to recover

said sum of $100,000.00; that in addition to the discovery of the alleged conversion of the aforementioned sum by the officers and directors of the defendant corporation, the said Joseph Byfield also caused an audit to be made of the accounts and affairs of the defendant corporation, and on, to-wit, January 15, 1925, the report of such audit was submitted to the said Joseph Byfield on behalf of said corporation, which your orator is informed and believes shows a deficit of over $2,500,000.00, a copy of said report being hereto attached and made a part of this, your orator's Bill of Complaint and marked "Exhibit "A," and for all the purposes of this Bill made a part hereof to the same extent as though said report was set forth at length herein; that on or about February 12, 1925, the said Joseph Byfield informed your orator in writing and all other stockholders of said defendant corporation, that the company's balance sheet on December 31, 1923, showed a surplus of $467,605.29, and that on the 2nd day of February, 1925, the statement shows a deficit of $2,678,496.59, or a shrinkage in the assets from December 31, 1923, to February 2, 1925, of $3,146,101.88, and that this shrinkage had all taken place within said period, and that on said 2nd day of February, 1925, the said Joseph Byfield as president and director of the defendant corporation further informed and stated to the public in the press and later informed your orator in writing, as well as all other stockholders, that his investigation revealed conditions much worse than he imagined, and that the affairs of the de-201 fendant corporation were so involved that it was impossible to operate it on a profitable basis.

6. In said communication the said Byfield used the following words—

"After ten weeks of almost constant attention to this business—a period of discoveries, griefs and disappointments one after the other—I am compelled to report to you that my original hope of saving the Company appears well nigh impossible. Our investigations have revealed conditions much worse than any of us had ever imagined. Discouragement lies in the fact that, seemingly, there is no limit to the involved situation. From our investigations to date, I am thoroughly convinced that seldom in the history of large American enterprises has a business been so woefully mismanaged and a general public so brazenly deceived. * * *"

And the following further recitals—

"We are at the present operating the plants from the collection of accounts; but this cannot continue indefinitely.

With weekly payrolls ranging from fifteen to twenty thousand dollars, large outlays in cash for woolens and other materials, rentals, taxes and interest to be paid, immediate action by the stockholders in the matter of financing is imperative."

7. That notwithstanding the charges which are now being made by the said Byfield and his associate officers and directors against the former officers and directors of the defendant corporation, and notwithstanding the fact that it appears from various written statements made by said former officers and directors of the defendant corporation to the stock exchange in Chicago and New York, as well as to the various Securities Divisions and the public where stock of the defendant corporation was sold, which statements show that the said representations were in effect false, untrue and
202 made with intent and purpose of creating a false and fictitious market so that the public would be misled as to the true condition of the defendant corporation, and by reason of such misrepresentations be induced to purchase the stock of the defendant corporation, no action has been instituted against such former officers and directors nor any attempt been made to recover the huge sums of money alleged to have been converted by the said former officers and directors, by the said Byfield or his said associate officers and directors, nor is there any promise or indication that they contemplate any such procedure, notwithstanding their representations and statements to the stockholders of the defendant corporation and to the public generally; and that by reason of the fact that the said Byfield and his associates have represented to the stockholders the desperate financial condition of said corporation and that he and they are aware charged by them, and have takenhtonsashrdlupupupupupu of the wrongful acts of misappropriation so stated and charged by them, and have taken no steps in behalf of the defendant corporation to regain any portion of said misappropriated moneys, your orator is informed and believes and charges the fact to be that by reason of the premises the only course by which any relief can be obtained on behalf of the defendant corporation will be the immediate appointment of a receiver with ample power and direction to cause a thorough examination of all the acts and doings of every one who has misapplied or misappropriated any portion of the assets of the defendant corporation and institute
203 such legal or equitable procedure as may be necessary and will be effective in securing a return to said cor-

poration of such misappropriated property or the proceeds thereof.

8. Your orator further represents that one Oscar Gumbinsky, who was one of the former Board of Directors and officers, prior to the taking in charge of the defendant corporation by said Byfield and associates, has caused certain advertisements to appear in the Chicago newspapers relative to the administration of said Byfield and of the affairs of the said defendant corporation, a copy of said advertisement is hereto attached and marked Exhibit "B" and for all the purposes of this Bill made a part hereof to the same extent as though copied at length herein; that by reason of the charges and countercharges made by the said Byfield in his said communications to your orator and the other stockholders and in said newspapers and the said advertisement by the said Gumbinsky and other communications of a similar import, the good will of the defendant corporation has now been wholly destroyed, and that by reason of the said financial condition and reputation so now existing the appointment of a receiver by this Honorable Court with full authority to repossess and marshal the assets of the defendant corporation in its behalf and for the benefit of all the stockholders thereof will not at the present time jeopardize the business of said corporation, but on the contrary will give to all concerned an assurance that the affairs of the cor-
204 poration will be hereafter conserved and that all persons and officers who, at any time hereafter have had to do with the assets and affairs of the defendant corporation will be required to make a strict, true and accurate accounting for all their acts, doings, transactions and relations with the affairs of and assets of the defendant corporation.

9. Your orator further represents that he is advised and so states the fact to be that some of the stockholders of the said defendant corporation who have been represented by other counsel than those employed by your orator, have recently made attempts to secure some action in behalf of said corporation and in such endeavor had requested the present officers and directors of the defendant corporation to make a thorough investigation of the affairs of the corporation since its incorporation to institute proper action at law or in equity in behalf of the defendant corporation against the former officers and directors and all other persons who have misappropriated and dissipated the assets of the defendant corporation, but the said officers and directors so approached

have refused to institute such action and have refused to cause an investigation to be made to determine the truth or falsity of the various charges made against the officers and directors relative to the conversion, concealment and disposition of large amounts of property and assets of the defendant corporation exceeding in the aggregate more than $1,000,000.00, and which legally and equitably belong to the defendant corporation, Boone Woolen Mills, Inc., and
205 your orator further represents that as appears from the information hereinbefore stated there has been a shrinkage of more than $3,000,000.00 in twelve months last past of the defendant corporation, and that no efforts have been made by the said officers and directors of the said defendant corporation to investigate the reason, cause or source of said shrinkage of assets or to take any steps whatever toward requiring a return of any portion of said misappropriated and dissipated assets.

10. Your orator further represents that by reason of the charges which are being made by the present officers against the former officers and the countercharges by the former officers against the present officers, it is impossible to procure a fair and impartial investigation of the affairs of the defendant corporation by any corporate action of the defendant or its officers and directors, whereby specific and definite information can exhaustively be obtained and of such trustworthy and reliable character as will enable a determination of the true financial condition of the defendant corporation or the value of the assets of the defendant corporation and the proportionate share of your orator as a stockholder and of all other stockholders of the defendant who are similarly situated, or of the true financial condition of the said defendant corporation, Boone Woolen Mills, Inc., by reason whereof your orator and other stockholders similarly situated are suffering irreparable loss and damage, which, unless immediately terminated, will result in the
206 entire loss of their several investments in the stock of said corporation.

11. Your orator further represents that during the period from November 14, 1924, when said Byfield and his associates took charge of said defendant corporation and up to December 31, 1924, the said defendant, Boone Woolen Mills, Inc., sustained a loss of approximately $75,000.00, the said Byfield and his associate officers and directors being exclusively in charge of the affairs and assets of the defendant

corporation, and therefore, alone responsible for its said loss and financial condition so resulting; and your orator charges that if the business of the defendant be continued under the present chaotic condition and with the inefficient management, with the good will, as hereinbefore more fully set forth already destroyed, with the credit of said Boone Woolen Mills, Inc., already shattered and practically destroyed, and no immediate assistance or protection afforded by the Court, said defendant corporation will become insolvent, resulting in a complete loss of your orator's said investment in the stock thereof and of other stockholders similarly situated; and your orator believes and charges the fact to be that if a receiver is appointed and a proper investigation is made by him under the direction of this Honorable Court that the moneys which such a receiver will recover for the defendant from all officers and directors, individuals and corporation, who have fraudulently, unlawfully and unjustly obtained, by any means whatsoever, portions of the assets of the defendant corporation and improperly converted the same to
207 their own use, will be sufficient, not only to discharge all liabilities of said corporation, but to rehabilitate its credit and give it ample resources with which its good will will be restored and its financial standing again be established.

12. Your orator further shows that by reason of the failure of said officers and directors to take proceedings, and by reason of the failure of such officers and directors, of their own initiative, to take any steps whatever to afford assistance to said defendant corporation and to the stockholders thereof, and by reason of the enormous sums of money so misapplied, embezzled and misappropriated, your orator and his associate stockholders have no remedy through the officers and directors of the defendant corporation, whereby any procedure at law or in equity can be resorted to for the redress of such injuries and the recovery of such losses, and that the only remedy and means of assistance to which your orator and other stockholders can now look is by this independent suit brought by your orator for the benefit of and on behalf of all other stockholders similarly situated, who may, at any time hereafter, join him herein and contribute to the expense hereof, and that unless this your orator's bill is entertained at this time and immediate relief is afforded, your orator will suffer, not only the losses heretofore sustained by reason of the wrongful acts of commis-

sion, but the resultant injury arising from acts of omission by the present officers, and having resorted to the only means through said corporation known to the law for the re-
208 dress of said injuries, and been unsuccessful in such endeavor, your orator, in his individual capacity and as a representative of all other stockholders who may join him herein, will be irreparably injured, and that in the interests of all concerned, this Court should issue its injunction or restraing order, directed to the officers and directors of the defendant corporation, enjoining and restraining them from in any manner pledging, mortgaging, encumbering, or in any manner creating any lien upon any of the assets of the defendant corporation, until the further order of the Court, and that this Court immediately appoint a receiver, with ample power and authority to institute a careful and full investigation as to all of the assets, moneys and effects, claims, accounts and transactions of the said defendant corporation, and of its officers, directors, and agents, at any time since the incorporation of said defendant corporation, and that upon the discovery of any misuse, misappropriation, diversion of other unlawful transfer of the assets of the defendant corporation, the said receiver be authorized and directed to take all needful, legal or equitable procedure to require a return to the defendant corporation of its money, assets and property which such receiver may discover as having been wrongfully, illegally and unjustly misappropriated and improperly transferred, and that said receiver may be authorized and directed to, from time to time, report to this Court the result of his investigations, and be authorized and directed to take such procedure as may be necessary to become fully possessed of all property and assets of said defendant corporation which may have been, by any person or persons or
209 corporations, wrongfully or unjustly converted or misapplied, and that in the meantime the said receiver be authorized and directed to continue the business of said corporation as a going concern, and for such purpose be authorized and directed to employ all experienced and capable help and assistants that will enable him to manage efficiently, and direct and operate the business of the defendant corporation in all its departments and to employ experienced and capable attorneys, who, under his direction, will institute such legal or equitable proceedings from time to time as Your Honors may direct, and that all steps of administration, management and procedure shall be taken and conducted

under and pursuant to the orders of this Court, after a full report of the conditions of the affairs of the defendant corporation and the necessities of said corporation are reported fully to the Court, and that such other and further procedure may be taken as will conserve the interests of your orator and all stockholders and other persons interested in the affairs of said corporation require.

13. But now so it is, may it please Your Honors, that by reason of the combinations and the confederating together of the said officers and directors of the said defendant corporation with divers person or persons unknown to your orator, whose names, when discovered, your orator prays may be inserted herein, with apt words to charge them as parties defendant hereto, who have conspired and contrived how to wrong and injure your orator and the other stockholders of the defendant corporation, and as a result of such conspiracy and wrongful plannings, have already caused
210 losses and misappropriations of a large portion of the assets of said corporation and corresponding losses of the profits which otherwise would have been realized from the conduct of said business, which losses and injuries have amounted to large sum of money, to-wit, four million dollars; and your orator further shows that unless a receiver for all of the assets of said corporation is immediately appointed, after due notice to the officers and directors of said defendant corporation, such officers and directors may take precipitate and unwise procedure by creating some species of lien or pledge, or otherwise destroy the credit of the defendant corporation so that it will be impossible for such corporation to properly function, and its business to be no longer continued as a going concern.

14. Forasmuch as your orator is without remedy in the premises, except in a court of equity, and to the end that said Boone Woolen Mills, Inc., which is made a party defendant to this bill, may be required to make a full and direct answer to the same, (but not under oath, the answer under oath being waived), and your orator prays that under direction of this Honorable Court an accounting may be taken of all the acts and procedure which have been taken by any or all of the directors and any or all of the officers and other persons who have had to do, in any capacity or relationship whatever, with the affairs of said corporation, and that upon the discovery of any unlawful misuse, diversion or misappropriation of the assets of said corporation, or any part thereof, this

Court may order such complete and adequate procedure as will restore such property and assets so misapplied, and the defendant corporation be thereby repossessed of all
211 moneys, property and assets heretofore wrongfully taken, misapplied and used from it, and that when said corporation has been so repossessed of the assets, moneys and property so unlawfully, fraudulently and unjustly taken from it, this Court shall direct a meeting of the stockholders of the corporation to be held at a date to be fixed by the order of the Court, of which meeting all the stockholders of record, as shown by the books of the defendant corporation, shall have due notice, as required by the statute of the State of Illinois and by the by-laws of said defendant corporation, when a new Board of Directors shall be chosen for said corporation from among the stockholders thereof, and that such order shall also provide when the directors so chosen shall meet and choose officers for the management of the affairs of the defendant corporation, and after such procedure has been duly reported to this Court a proper order be entered, directing the receiver in charge of the assets and management of the defendant corporation, to make his final report to the Court, and upon approval thereof, be directed to turn over to such duly elected officers and directors of the defendant corporation all of the assets so marshaled by the said receiver, less his reasonable charges and expenses, as may have been approved by this Honorable Court, and that your orator shall have such other and further relief in the premises as equity shall require and to the Court shall seem meet.

15. Your orator further prays that a temporary restraining order or injunction may immediately issue, after due notice, against the officers and directors of the defendant
212 corporation, and the agents, servants, attorneys and solicitors thereof, and each of them, enjoining and restraining them from making any conveyance, pledge or hypothecation of any character or description of the assets of the defendant corporation, or in any manner interfering with its business and affairs, until the further order of the Court.

May it please your Honors to grant the writ of summons in chancery, directed to the Sheriff of Cook County, that being the County in which said defendant, Boone Woolen Mills, Inc., has its general office commanding him that he summon the said Boone Woolen Mills, Inc., to appear before this Court on the first day of the next March Term thereof,

to be held in the Court House at Chicago, in the county aforesaid, and then and there to answer this bill, and that your orator may have such other and further relief in the premises as to equity may seem meet and justice may appertain, etc.

(Signed) HARRY HURWITZ,
Complainant.

GERAS & LEONARD,
Solicitors for Complainant.

State of Illinois, } ss.
County of Cook. }

HARRY HURWITZ, being first duly sworn upon oath deposes and says that he is the complainant in the above entitled cause; that he has read the said Bill and knows the contents thereof and has personal knowledge of the
213 facts therein stated, except as to such matters as are alleged upon information and belief, and that the allegations in said Bill are true of his own knowledge, except such matters as are alleged to be upon information and belief, and as to those allegations he believes them to be true.

Affiant further states that unless a receiver is appointed for the defendant and its assets and effects upon giving notice to said defendant of the proposed application for the appointment of a receiver that he feels that some hostile procedure, or some act will be taken by some creditor which will result in a great loss and embarrassment to said defendant corporation and the stockholders thereof.

Affiant further states that unless a temporary injunction or restraining order is issued out of this Honorable Court, on notice to said defendant, that he feels that he and also the other stockholders of the defendant corporation will suffer great and irreparable loss and damage.

(Signed) HARRY HURWITZ.

Subscribed and sworn to before me this 14th day of February, A. D. 1925.

(Seal)

CECILE GEHANT,
Notary Public.

214 EXHIBIT "A."

Reckitt, Benington & LeClear

Western Union Co

Ernest Reckitt — Certified Public Accountan
Harold Benington — Chicago & New Yo
Walter M. LeClear — 140 South Dearborn Streets "Nestold
Chicago

Mr. Joseph Byfield, President, January 15th, 1925.
Daniel Boone Woolen Mills, Inc.,
Chicago, Illinois.

Dear Sir:

In accordance with your instructions, we have prepared ar submit herewith, Balance Sheet of the Daniel Boone Wool Mills, Inc., as at December 31st, 1924. This statement h been drawn off by us from the Company's Books of Accou without our having audited the transactions subsequent November 14th, 1924.

A physical Inventory was taken by us as at Novemb 14th, 1924, and priced as regards Raw Materials at Cost Market, which ever was lowest, as regards Goods in Proces Supplies and Finished Cloth at Mill Cost, and as regar Finished Garments at contract selling prices less an allowan for shipping expenses. Practically the entire stock of Fi ished Garments had been sold by December 31st, 1924.

During the month and a half which elapsed between Nover ber 14th and December 31st, 1924, the mill and garment fa tories were engaged in the manufacture of a Spring line fabrics and garments none of which had been sold, howeve at December 31st. We have, therefore, treated the Cost the purchases of raw material, the factory labor and th manufacturing overhead expenses incurred during this perio as an addition to the Inventory.

The Fixed Assets in Chicago are stated at their appraise value as determined by the Lloyd, Thomas Company on Au gust 8th, 1921, plus subsequent additions at cost and le adequate depreciation to date. The Baltic Plant is state at its purchase price to the Company, plus subsequent add tions and less adequate depreciation to date. The Machiner and Building Improvements connected with the garment fa tories are stated at cost less adequate depreciation to date.

So far as we were able to ascertain, all known Liabiliti have been included on our Balance Sheet. We are informe by the Officers of the Company that the $100,000.00 liabili

to Gumbinsky Brothers Company, which is in litigation, 215 will in their opinion be entirely extinguished by counter-claims. We are also informed that the liability for Federal taxes in the amount of $36,220.50 will be materially reduced as the result of claims for credit now pending and which may possibly entirely offset this liability.

The Stockholders' equity was further impaired in the month and a half during which the new management was in control owing to the fact that no goods were sold other than Finished Garments which were as previously explained already inventoried at contract selling price, while many administrative and selling expenses had necessarily to be incurred. The changes in the deficit during the period were as follows:

Deficit at November 14th, 1924, as per our previous report		$2,544,062.54
Add:		
Additional Reserve found necessary to provide for losses on advances to Salesmen, etc.		53,149.87
Expenses November 15th to December 31st, 1924, as under:		
Selling Expenses	$ 6,910.30	
Shipping Expenses	5,957.92	
Administrative Expenses	8,816.86	
Interest and Discount	13,572.26	
Advances to Salesmen	28,656.34	
Bad Debts	7,876.25	
Allowances on Merchandise	9,427.07	
Loss on Consigned Merchandise	1,064.80	
Miscellaneous	2,038.81	
	$84,320.61	
Less:		
Profit on Merchandise Sold	$1,939.64	
Other Income	1,096.79	3,036.43
		81,284.18
Deficit as at December 31st, 1924		$2,678,496.59

Respectfully submitted,

RECKITT, BENINGTON & LECLEAR,
Certified Public Accountants.

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Daniel Boone Woolen Mills, Inc.
Balance Sheet as at December 31st, 1924
(Subject to Report herewith)

Assets

Current Assets:			
Cash on Hand and in Banks			$ 47,582.13
Notes and Accounts Receivable:			
Notes Receivable—Customers	$ 12,189.52		
Notes Receivable—Employes	2,540.00		
Freight Claims	225.00		
Accounts Receivable	365,069.13		
	$ 380,023.65		
Less Reserve for Bad Debts	10,000.00		
			370,023.65
Inventories:			
Raw Materials, Goods in Process and Finished Cloth	$ 599,273.95		
Finished Garments	11,696.66		
Consigned Merchandise	7,500.00		
			618,470.61
			$1,036,076.39
Investments:			
Second Mortgage Bonds on Rock Island and Davenport Plants			23,500.00
Fixed Assets:			
Chicago:			
Land	$112,513.94		
Buildings and Building Improvements less Depreciation	485,480.25		

Machinery, Equipment, Furniture and Fixtures less Depreciation	658,929.41		
			$1,256,923.60
Baltic:			
Land, Buildings, Machinery and Equipment less Depreciation		187,781.20	
Garment Factories:			
Building Improvements less Depreciation	$ 28,768.00		
Machinery, Equipment, Furniture and Fixtures less Depreciation	190,590.61	219,358.61	
			$1,664,063.41
217 Deferred Charges:			
Prepaid Insurance Premiums	$ 16,597.63		
Prepaid Franchise Taxes	3,558.00		
Prepaid Interest	154.17		
			20,309.80
			$2,743,949.60

Liabilities

Current Liabilities:		
Notes Payable—Banks	$ 60,000.00	
Notes Payable—Trade Creditors	1,372.96	
Accounts Payable—Trade	44,133.98	
Accrued Pay Rolls and Commissions	5,808.17	
Accrued Interest	10,682.33	
Employes' Payments or Stock Subscriptions	6,612.50	
Federal Taxes	36,220.50	
Real Estate and Personal Property Taxes (Estimated)	7,500.00	
Credit Balances on Accounts Receivable	17,399.09	
Reserve for Reorganization and Unadjudicated Claims	32,716.66	
		222,446.19
Notes Payable to Gumbinsky Bros:		
In Litigation		100,000.00
Mortgages:		
On Baltic Plant	$ 125,000.00	
On Chicago Plant	287,500.00	
		412,500.00
Stockholders:		
Common Stock (Authorized 250,000 shares at $25.00 per share) issued and outstanding 187,500 shares	$4,687,500.00	
Deficit, December 31st, 1924	2,678,496.59	
		2,009,003.41
		$2,743,949.60

Note: At the Annual Meeting to be held March 3rd, 1925, the Stockholders will be asked to consent to a reduction in the par value of their Stock sufficient in amount to extinguish the existing deficit.

Having allowed several scurrilous and unfounded attacks on my integrity to appear in print without comment, I cannot now be accused of seeking publicity in making an answer to these charges as follows:

Losses in the Daniel Boone operations during the first nine months of 1924 (prior to Mr. Byfield's regime) were caused largely by an error in mill practice which seriously affected the quality of the overcoating cloth produced for last season and by a labor strike at the Company's garment factories, both of which occurrences were followed by a backward clothing season, resulting in a loss of large proportions, but not such an amazing loss as shown by Byfield nor one that is new in the commercial history of enterprises of this nature.

As soon as Mr. Byfield took charge he started on a man hunt with absolute disregard for the interest of the stockholders and at great cost to their Company, both directly in money and in the dissipation of the time of the employees, who should have been busy attending to their respective duties.

Numbers of detectives were employed to watch those connected with operating the business, as well as those previously connected with it, and a conference was actually held in which the advisability of employing burglars to get alleged evidence not supposedly otherwise available was discussed.

Glittering promises and suggestions of large compensations have been held out as inducements to various individuals if they would sign statements previously prepared by Mr. Byfield.

Mr. Byfield employed Mr. Frank B. Wolfe, a Certified Public Accountant, as comptroller of the Company and elected Mr. Wolfe as a member of his Board of Directors. Mr. Wolfe's instructions were to disregard everything and "get" something on Mr. Gumbinsky. At the end of several weeks' checking every incoming and outgoing dollars of the Company, from the inception of the enterprise until the beginning of Mr. Byfield's regime. Mr. Wolfe reported to him that the Gumbinsky regime was unquestionably conducted loyally and honestly. Mr. Byfield was very much chagrined by this report and a day or two later discharged Mr. Wolfe.

One of the next steps was to sell all of the made-up clothing to the Surplus Merchandise Corporation of New York, deal-

ers in bankrupt stocks, without even inviting other buyers or bidders and without investigating into the value and
219 quality of the merchandise that he was selling, the entire transaction taking about thirty minutes, in which thousands of fine worsted suits with extra pairs of trousers, costing the Company with its low cost facilities, approximately $30.00 each, were sold at $10.83. Much of this merchandise was immediately resold by the Surplus Merchandise Corporation at an astounding profit, the loss to the company in the transaction exceeding half a million dollars.

In addition to this, yarns on hand were inventoried by them at 30c per pound and shortly thereafter sold by the Byfield regime at over $3.00 per pound. Wool mixes ready for yarn-making and which cost the company 70c per pound and which at the time of inventory, with a higher wool market, were worth up to $1.00 per pound or $2,000.00 per ton, were inventoried as low as $1.00 per ton. Everything else was handled with a like viewpoint in order to inflame the public mind.

In furtherance of this malicious intent to destroy the good name of a fellow citizen which in a similar instance was recently characterized by a Judge of the New York Supreme Court as the cheapest and lowest of crimes, a suit was instituted against Gumbinsky Bros. for the recovery of $250,000 for rags paid for but not delivered. The utter deception in this is obvious when it is pointed out that the total amount of rags paid for by the Daniel Boone Woolen Mills during the entire years of 1922, 1923 and 1924 amounted to $192,150.28. This represented practically all if not all of the woolen rags and re-worked wool used in the company's big Diversey Parkway plant during its entire existence. These figures and facts were well known to Mr. Byfield.

No trace of an effort to operate the properties for the benefit of the stockholders is apparent in any of Mr. Byfield's actions. When Mr. Byfield first took a hand in Daniel Boone affairs, the price of the stock was over $11.00 per share. The public announcement of his active participation quite apparently did not encourage the confidence of stockholders as evidenced by the fact that the market declined immediately upon the announcement and has continued to decline ever since.

Within recent days, a large New York clothing manufacturer, with a great belief in the Daniel Boone proposition, came to see Mr. Byfield and offered to invest $500,000.00 of

his own money and raise an additional $500,000.00, all of which was to be without commission or cost to the Company, only to be told by Mr. Byfield that his executive committee, consisting of himself and two of his employees, had decided not to negotiate with this party, and in the same week he told one of his other directors that he thought the best thing for the Company was a friendly receivership and that he would suggest same to the stockholders.

In all my connection with the Company I have drawn not one cent for salary and less than $1,000.00 for expenses—
220 have loaned the Company many hundreds of thousands of dollars and have guaranteed the Company's banking obligations for approximately one million dollars. In contrast to this, Mr. Byfield, after getting control of the Company through flamboyant promises, has since made it known that he would not loan the Company nor endorse for the Company a single penny and his activities in behalf of the Company are best shown by the fact that he has not visited six of the seven plants of the Company since he has taken charge.

A well conceived, serious minded, great undertaking that had met with several coincident reverses in a season was made an Opera Bouffe all because Mr. Byfield had the reputation of being a successful hotel operator due to his experience and willingness to operate a hotel along its most profitable lines.

OSCAR GUMBINSKY

Chicago, Illinois, February 10, 1925.

221 And the court, having heard the arguments of counsel, took the matter under advisement, and thereafter set the matter for July 9th, 1925, for decision, and on said last mentioned date, the parties appeared (the appearances the same as first above set forth), and the court by his Honor James H. Wilkerson rendered its decision in writing in the premises, as follows:

222 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

United States Worsted Sales Co., a corporation,
Complainant,
vs.
Daniel Boone Woolen Mills, Inc., a corporation,
Defendant.
} No. 4660.

DECISION.

The bill in this case and the consent of the defendant gave to the Court jurisdiction over the parties and the subject matter, and "warranted the appointment of a receiver. (*In re Metropolitan Railway Receivership*, 208 U. S. 90, 107, and cases cited; *Pusey* v. *Jones*, 261 U. S. 491, 500); *Atwater* v. *Community Fuel Corporation*, 291 Fed. 686; *Luling Collieries Co.* v. *Interstate Coal and Dock Co., et al.*, 287 Fed 711; *Same* v. *Same*, 281 Fed. 268; *Re Connecticut Brass Mfg. Co.* 257 Fed. 443; *Burton* v. *R. G. Peters Salt and Lumber Co.*, 190 Fed. 262, 265; *Horne* v. *Pere Marquette R. Co.*, 151 Fed. 626, 634.)

The defendant submitted itself to the jurisdiction of the Court. The consent to the appointment of the receiver was given with the authority of the directors of the corporation.

The receiver took possession of the property in this dis-
223 trict. Ancillary receivers were appointed in other districts. The rights of many others have intervened. Title to property which has been sold depends upon the validity of this proceeding. The Superior Court of Cook County did not appoint receivers until February 28, 1925, nine days after the appointment of the receiver in this Court; and the application of the receivers named by the State Court for the turning over of the property to them was not filed in his Court until March 13, 1925.

The State Court receivers will not be permitted to attack the jurisdiction of this Court. The language of Judge Lurton in *Horne* v. *Pere Marquette R. Co. supra* (p. 634) is apposite: "A most absurd result would ensue, if, when the corpora-

tion has submitted to the jurisdiction of the court, either as a court of equity or to the local jurisdiction, a creditor could come in, or when brought in, might reopen the matter of jurisdiction over the debtor corporation. If such an objection is not waived once for all, so as to close the question as to stockholders and creditors, what number of creditors would conclude the rest?"

(See *Pusey & Jones Co.* v. *Hanssen, supra,* 500; *Kessler* v. *Hecker, Inc.,* 258 Fed. 654, 660.)

This Court did not interfere with the jurisdiction of the State Court when it appointed the receiver in this case. The issues here were different from those in the case then pending in the State Court. The property of defendant was not in the constructive possession of the State Court. The State Court, when it finally appointed receivers, did not act upon the situation as it existed on February 16, 1925. It acted upon a changed situation brought about by the filing of new and amended pleadings, (*Empire Trust Co.* v. *Brooks,* 232 Fed. 641; *Knudson* v. *First Trust & Savings Bank,* 246 Fed. 31; *McAtamney* v. *Commonwealth Hotel Const. Corp.* 296 Fed. 500; *Welch* v. *Union Casualty Ins. Co.,* 238 Fed. 224 986). *Hegner* v. *Hegner,* 269 Fed. 537, is not applicable in my opinion. The Court said (p. 542):

"This proceeding was of the same nature, in regard to the same issues, and for the same purpose, as the proceeding in the State Court to appoint a receiver."

It must be borne in mind that the State Court did not act until nine days after the appointment in this Court, and then upon different pleadings. The statement in the State Court of the attorney for the defendant, even if given the extreme meaning claimed for it (a meaning which in my opinion is not warranted by the evidence) could not operate to invalidate the proceedings in this Court. At most it amounted to an agreement, a violation of which would have been a contempt of the State Court. If it has the force of an injunction, it would not render void the action in the Federal Court. (*Cole* v. *Cunningham,* 133 U. S. 107, 119; *Royal League* v. *Kavanagh,* 233 Ill. 175, 183.) The bringing of an action in disobedience of an injunction constitutes no defense to the action.

When the receiver was appointed in this Court there was nothing before the Superior Court of Cook County, but the bill of the original complainant, Hurwitz, in the suit there pending. The record there showed a motion for the appoint-

ment of a receiver which had been continued. The Court had taken no action which brought defendant's property within its custody; and it was not until March 13, 1925, that it was claimed in this Court that there was any agreement in the State Court beyond the terms of the order of February 16, 1925. In the meantime, the Federal Court here and in other districts proceeded with the administration of the affairs of the defendant corporation. As Judge Lurton said, it would lead to absurd results and inflict unwarranted injury upon innocent parties, if the alleged oral agreement of the attorney in the State Court, of which there was no record, can be invoked to invalidate the proceedings here.

225 The original bill in the State Court was a stockholders' bill charging mismanagement of the corporation. The bill here is a suit on behalf of all creditors. Certainly stockholders, by filing a bill and making a motion for a receiver upon which no action is taken, may not preempt the field of litigation so that creditors may not proceed to assert their rights. The rule invoked by the state receivers would enable one class of litigants whose interests are essentially antagonistic to those of another class, to deprive that class of litigants of access to the Courts of their own selection through the instrumentality of the institution of a suit and a motion for a receiver and without any action of the Court with reference to the custody of the property. There is no case which undertakes to defend any such extreme application of the rule of comity.

As to the motion of the attorneys for the receivers in the State Court to be substituted as attorneys for the defendant, it must be borne in mind that the appointment of a receiver pendente lite does not strip the corporation of its corporate existence nor supersede it in the exercise of its corporate powers, except with respect to the property committed to the custody of the receiver. (*Assets Realization Co.* v. *Defrees*, 225 Ill. 506; *Evans* v. *Illinois Surety Co.* 298 Ill. 101.)

The attorneys for the State Receivers will be recognized in all matters as to which these receivers are entitled to be heard; but it would be improper for this Court to undertake to control the employment of counsel by a litigant in the manner here proposed.

There is pending a motion to strike the intervening petition of David Liebwitz and Jacob Rosenbaum. These petitioners have an interest in the litigation and should be permitted to intervene. The intervention is in subordination to the main

proceeding (Equity Rule 37.) The question of the ex-
226 tent of relief under the intervening petition is not now before the Court and this ruling is not to be taken as an indication that the full relief asked in the petition will be granted. That question will be determined when the course of the main proceeding is more definitely marked out.

The motion of the receivers appointed by the Superior Court of Cook County to turn over to them the property in the custody of the receiver of this court is overruled. The motion to have the atttorneys for the receivers in the State Court substituted as attorneys for the defendant here is overruled without prejudice to the rights of said attorneys to be heard upon all matters in which the State receivers have an interest under the order of the State Court. The motion to strike the intervening petition of Liebowitz et al., is overruled and the parties to this suit are ruled to answer the same within twenty days.

Signed JAS. H. WILKERSON
Unied States District Judge.

9 July, 1925.

227 And Forasmuch as the matters aforesaid do not fully appear of record, the State Court Receivers herein deliver this, their certificate of evidence and statement of facts and pray that the same may be signed by the judge of this court pursuant to the statute in such case provided, which is done accordingly this 15th day of September, A. D. 1925.

JAMES H. WILKERSON
Judge.

(Endorsed) Filed Sep 15-1925 Charles M. Bates, Clerk.

74 And on, to-wit, the 29th day of June, 1925, came the parties hereto, by their attorneys, and filed in the office of the clerk of said court their certain Stipulation as to Certificate of Evidence in words and figures as follows, to-wit:

Dec 29. 75 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illionis

Eastern Division

In re Petition of Max A. Gordon
vs.
Edward A. Brundage, Receiver. } Equity #4660

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys, that original certificate of evidence be incorporated into record of appeal in this cause in lieu of copy thereof.

WERNER M. SCHROEDER
MURPHY O. TATE
Attorneys for Petitioner

RALPH F. POTTER
Attorney for Receiver

Dated this 29th day of June, A. D. 1925.

(Endorsed) Filed Jun 29 1925 Charles M. Bates, Clerk.

87 And on, to-wit, the 10th day of August, 1925, came Edward J. Brundage, Receiver, by his attorney, and filed in the office of the clerk of said court his certain First Report and Account in words and figures as follows, to-wit:

88 United States of America
Northern District of Illinois } 88.

Filed A
1925.

IN THE UNITED STATES DISTRICT COURT

In and for the Northern District of Illinois

Eastern Division

United States Worsted Sales Company,
Complainant,
vs.
Daniel Boone Woolen Mills, Inc.
Defendant.
} Equity No. 4660

FIRST REPORT AND ACCOUNT OF RECEIVER.

To the United States District Court, for the Northern District of Illinois, Eastern Division:

Edward J. Brundage, Receiver of defendant in the above entitled cause, hereby makes his first report and account:

1. He was duly appointed as Receiver for the said defendant on the 19th day of February, 1925, and upon notification thereof, filed his bond and qualified as such Receiver. He thereupon immediately proceeded to take possession of all offices, places of business and property, including books, and records of the defendant which he was able to find, and employed Arthur Young & Company, certified public accountants, to make a complete audit of the defendant's books and an inventory of stock and materials on hand.

2. The Receiver found that the defendant was engaged in the business of weaving cloth at its mills in Chicago, Illinois and Baltic, Connecticut, and in the manufacture of
89 such cloth into men's suits, top coats and over coats at factories located in Rock Island, Moline and East Moline, Illinois, and in Davenport, Iowa. The Receiver took immediate possession of the mills at 1735 Diversey Parkway, Chicago, and the garment factories at 15th Street and Third Avenue, Moline, Illinois (Garment Shop C); at 13th Street and 5th Avenue, Rock Island, Illinois (Garment Shop A); at 24th Street and 4th Avenue, Rock Island, Illinois (Garment Shop B), and the property on First Street in East Moline, Illinois, known as the Midland Plant (Garment Shop E).

The Mills in Baltic, Connecticut and the garment factory in Davenport, Iowa, were shortly afterwards taken possession of by ancillary receivers as hereinafter mentioned. An inventory of the properties so coming into the possession of this Receiver has been filed in this Court.

3. The Receiver found large quantities of cloth in various stages of manufacture upon the looms, and considerable manufactured cloth on hand at the Chicago mills; large quantities of cloth at the Rock Island, Moline and East Moline garment factories in various stages of manufacture into men's garments; many unfilled orders for garments on hand and many salesmen scattered over the country soliciting and taking orders.

The goods then on hand and in process of manufacture were largely seasonable in their nature, being for the most part light weight goods intended for early spring and summer trade and the marketability for such goods in the usual course of business was rapidly diminishing because of the lateness of the season. It was therefore imperative that orders on hand should be filled and that the remainder of the seasonable good should be sold as soon as possible. To this end the Receiver immediately directly his efforts.

It also was very soon ascertained that the output of cloth and garments was grossly in excess of the orders
90 being obtained; that a stock of finished garments was on hand for spring and summer trade out of all proportion to reasonable expectations of sales to the trade at such a late period in the season and to a large extent of garments of a style and quality for which orders were not being received; that many orders had been received before the receivership, which remained unfilled because of the excessive manufacture of garments of styles not covered by such orders, giving good cause for cancellation of many of such orders, prospects of further cancellations and possible rejections of shipments. The Receiver therefore became of the opinion that it would be unwise, because of the lateness of the season, to attempt to manufacture further garments or solicit further orders from the trade of spring and summer goods. During the first month of the receivership, therefore, orders on hand were filled as rapidly as possible; all salesmen were recalled and their services dispensed with; further manufacture of garments was stopped, and the payroll at all of the plants in the possession of this Receiver was considerably reduced. At the Chicago mills a policy was adopted of finishing the manufacture of cloth then upon the looms only.

The Receiver thereupon began to seek bidders for the seasonable stock on hand and all other stock not essential to the plants as going concerns.

Receiver's Certificates.

In the meantime it was found that the company was without funds to meet payrolls overdue at the date of this Receiver's appointment, or to meet subsequent payrolls and other operating expenses. The Receiver therefore applied for and received authority from the Court on February 20, 1925, to borrow money and issue Receiver's Certificates therefor in a sum not to exceed Seventy-five Thousand ($75,000.00) 91 dollars. Pursuant to this authority the Receiver borrowed at 5 per cent interest from the Foreman National Bank of Chicago, for which Receiver's Certificates were issued, Ten Thousand ($10,000.00) dollars on February 20, 1925, and Fifteen thousand ($15,000.00) dollars on March 4, 1925, all of which certificates, together with interest thereon, were subsequently on April 27, 1925, paid off, redeemed and cancelled by the Receiver. No further Receiver's Certificates have been issued.

Ancillary Receiverships.

The mills of the defendant located at Baltic, Connecticut, were taken possession of by two Ancillary Receivers appointed by the United States District Court in that State, of which Thomas J. Spellacy of Hartford, Connecticut, is one, and this Receiver is the other. At that plant the manufacture of raw materials on hand into cloth was largely completed, and under the orders and directions of the Connecticut District Court, all cloth and raw materials on hand have been converted into cash, which is still being held by such Ancillary Receivers, subject to the disposition of the Connecticut District Court. The mills at Baltic, together with the furniture, office equipment, machinery, tools, etc. therein, remain undisposed of.

The garment factory at Davenport, Iowa, was taken possession of by A. G. Bush of Davenport, Iowa, as Ancillary Receiver appointed by the United States District Court for the Southern District of Iowa, Davenport Division.

Public Sales.

Pursuant to the policy adopted of seling to the highest bid
der cloth and garments on hand as quickly as possible, and
of disposing of all raw materials not essential to the plant
as going concerns, this Receiver under various specific orders
and directions by this Court, made public sales to the highest
bidder throughout the months of April, May, June, 1925, the
total receipts from which were $282,260.34. More detailed
information concerning these sales appears in the various
Receiver's petitions and reports and court orders on file in
this cause.

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Leases.

The various factories at Rock Island, Moline and East
Moline are not owned in fee by the defendant but are held
on leases provided for the payment of rent, or upon contracts
or agreements to purchase providing for the payment by the
lessee of interest on bonds. In order to preserve these fac
tories as going concerns and to preserve the rights of the
defendant under the leases and agreements, which are be
lieved to be of considerable value, the Receiver has promptly
paid the rent and the interest on the bonds as provided in
the various leases and agreements, as and when the same
became due.

The factory at Davenport, Iowa, is also occupied upon
agreement to pay interest on bands covering the factory prop
erty. The Ancillary Receiver in Daveport has no funds
with which to pay such interest, and this Receiver has paid
the interest accruing with respect to the Iowa plant.

The defendant, at the date this Receiver was appointed
occupied certain office space in the Lytton Building, in Chi
cago, under lease from January 1, 1923, to December 31, 1923
at a monthly rental of One hundred seventy-five Dollars
($175.00). This lease was cancelled upon payment by the
Receiver of Seven hundred three Dollars ($703.00).

Refund to Employees of Money Paid on Capital Stock.

The defendant in the year 1923 had encouraged the sale
on the installment plan, of the capital stock of the corpora
tion. Afterwards, by a vote of the Board of Directors, refun

was authorized to the employees of the amounts paid. The Receiver found that a total of Twenty-four hundred fifty-six Dollars ($2,456.00) was in the possession of the defendant, and not refunded to its employees pursuant to this authorization, and by Court Order a refund to this amount was authorized and has been paid by the Receiver to the various employees entitled thereto.

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Claims Against the Defendant

By order of Court the time for filing claims expired June 17, 1925. Claims filed amount to nearly Eight hundred thousand ($800,000.00) dollars. Contested claims have been referred to Master in Chancery Thomas J. Peden, and are in process of hearing. A large amount of claims are shown to be correct by the books of the defendant and the Receiver will make no objection to their allowance. Many other claims are being contested by the Receiver.

Income Taxes

For the year 1923 the Daniel Boone Woolen Mills, Inc. filed an income tax return showing a large profit. Prior to the appointment of the Receiver, the then officers of the Daniel Boone Woolen Mills employed Archibald Harris & Company, Accountants, to audit the books for the purpose of ascertaining the correctness of such income tax return.

It was contended that instead of a profit, as shown by the return, the Daniel Boone Woolen Mills had sustained a heavy loss for the year 1923 and should have paid no tax whatsoever. The Receiver continued the employment of Archibald Harris & Company to complete this income tax audit, but because of a temporary receivership of that firm the Receiver was obliged to place the matter of income tax in other hands. Garfield Charles, a member of the Chicago Bar, was retained and now has supervision of this matter. The Collector of Internal Revenue has filed a claim in the sum of $38,629.51 which is being resisted by Garfield Charles.

Attorney for Receiver

The Receiver, by Order of Court, employed Ralph F. Potter as his attorney and counsellor, to advise him in matters relating to the receivership, and has at all times had the benefit of his advice and assistance.

94 Administrative Employees

Retention of some of the administrative officers of the defendant was deemed by the Receiver to be essential to the operation or liquidation of the defendant's business, which was somewhat extensive and of a nature requiring specialized knowledge concerning the manufacture and sale of cloth and garments, and particular knowledge concerning the business of the defendant.

Mr. Frank Solomon, former general manager, Mr. R. H. Fox, former manufacturing superintendent at the Chicago mills, Mr. J. Arnstein, former credit manager, and Mr. Samuel Unterman, former superintendent of the garment factories at Rock Island, Moline and East Moline, were retained by the Receiver. In the many perplexing problems which have faced the Receiver, he has been guided, to a considerable degree, by the advice of these men in their respective fields of work.

As the affairs of the receivership developed, it was found feasible to dispense with the services of Mr. Frank Solomon the first of May, and the Receiver was able to dispense with the services of Mr. Fox and Mr. Unterman the first of August. Mr. Arnstein remains at this time, continuing his efforts to collect the accounts receivable.

The Receiver also employed at the Chicago plant Mr. H. W. Boos as auditor to supervise the accounts and the work of the bookkeepers.

Present Status of Plants

At this time the mills in Chicago are idle, practically all stock on hand has been disposed of and all employees have been discharged except the necessary watchmen and Mr. Arnstein and Mr. Boos above referred to.

The plants at 13th Street and 5th Avenue, Rock Island, and
15th Street and 3rd Avenue, Moline, have been leased
95 under Order of Court to the International Tailoring
Company for a period of six (6) months beginning August 1st upon certain terms; in general being payment by the lessee of all rent, or interest on bond issues or other sums due from the defendant under the leases and contracts by which the defendant occupied such premises, and in addition thereto a sum equal to six per cent. (6%) on the appraised value of the equipment in such plants.

The plant at East Moline is idle, and the plant at 24th Street and 4th Avenue, Rock Island, has not been in operation since the receivership, the equipment having largely been transferred to other plants prior to the appointment of the Receiver.

Cash Receipts and Disbursements

Attached hereto is a report of the cash receipts and disbursements by the Receiver from February 19, 1925, the date of the receiver's appointment, to July 15, 1925, prepared by Arthur Young & Company, Certified Public Accountants, employed by the Receiver.

Conclusion

The receiver has, for a time, been advised by former officers of the defendant of efforts to reorganize the corporation, and has endeavored to keep in touch with all plans looking toward that end and to keep the plants available in the event a reorganization is effected. It is apparent, however, that the best interests of the creditors are inconsistent with the indefinite holding of defendant's plants in their present status, and that a financial reorganization of the defendant must be effected within a short period or the interests of the receivership estate will demand that the Receiver protect the interests of creditors by applying for an order to sell
96 the plants to the highest bidder.

The Receiver prays that this Report and Accounts be approved, and that such other and further Orders be issued in the premises as to the Court shall seem proper.

EDWARD J. BRUNDAGE,
Receiver, Daniel Boone Woolen Mills, Inc.

RALPH W. POTTER,
Attorney for Receiver.

State of Illinois } ss.
County of Cook }

EDWARD J. BRUNDAGE, being first duly sworn, on oath deposes and says that he is the Receiver whose name is subscribed to the foregoing Report and Account; that he has

read said Report and Account, and that the facts stated therein are true to the best of his knowledge and belief.

EDWARD J. BRUNDAGE.

Subscribed and sworn to before me this 7th day of August, A. D. 1925.

GRACE RUSHFORD
Notary Public.

(Seal)

Grace Rushford
Notary Public
Cook County, Ill.

97

Arthur Young & Company
Members American Institute of Accoutnants
105 So. LaSalle Street
Chicago

July 31, 1925.

Mr. Edward J. Brundage,
Receiver, Daniel Boone Woolen Mills. Inc.
Chicago.

Dear Sir.

In accordance with your instructions we have made an examination of the Receiver's accounts of the Daniel Boone Woolen Mills, Inc. excluding Baltic Plant, from February 19, 1925 to July 15, 1925 and attach hereto statement showing cash on hand and in Banks at date Receiver was appointed, receipts and disbursements since that date to July 15, 1925 and cash on hand and in Banks at July 15, 1925.

With the exception of a small amount received from cash sales, which was used for petty cash disbursements, all receipts shown in this statement were traced into the depository Banks. We examined vouchers and pay rolls supporting all disbursements. Cash in Banks was verified by certificates received from the various Banks which were reconciled with the amounts shown on the books. Cash on hand at Chicago was counted but we made no verification of the small balance of petty cash said to be on hand at Rock Island, Illinois.

We shall be glad to furnish detailed schedules supporting the amounts shown in the attached statement if you desire.

Yours faithfully,

ARTHUR YOUNG & Co.

98 STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS BETWEEN FEBRUARY 19, 1925 AND JULY 15, 1925

	From transactions originating prior to Receivership	From transactions originating between Feb. 19 and July 15, 1925	Total
CASH ON HAND, FEBRUARY 19, 1925:			
Petty Cash—Chicago			$ 410.25
" Rock Island			61.39
FIRST TRUST AND SAVINGS BANK—Rock Island			1,314.76
Chicago Trust Company—Chicago			6,226.51
Marshall and Ilsley—Milwaukee			962.84
Noel State Bank—Chicago			1,241.68
Peoples Savings Bank—Chicago			757.33
Second Security Bank—Chicago			237.50
Greenebaum Sons Bank—Chicago			53.79
Manufacturers Trust Company—New York			1,539.61
			$ 12,805.66
CASH RECEIPTS			
From Accounts Receivable	$108,560.79		108,560.79
" Sales made since date of Receivership		386,596.61	386,596.91
" Accounts Receivable—Employes	10.00		10.00
" Bad Debts Collected	845.11		845.11
" Notes Receivable:			
Customers	5,149.50	772.25	5,921.75
Employes	50.00		50.00
" Trade Acceptances	3,814.68	6,955.25	10,769.93
" Receiver's Certificates		25,000.00	25,000.00
" Outstanding Checks—February 19, 1925—Payment Stopped	5,830.17		5,830.17
" Interest On Bank Balances		1,292.37	1,292.37
" Interest Earned:			
Accounts Receivable	20	28.05	28.25

90 **STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS BETWEEN FEBRUARY 19, 1925 AND JULY 15, 1925**
(Continued)

	From transactions originating prior to Receivership	From transactions originating between Feb. 19 and July 15, 1925	Total
CASH RECEIPTS FEBRUARY 19, 1925			
Notes Receivable	55.57	4.46	60.03
Bonds		612.52	612.52
From Discount Earned		13.53	13.53
" Insurance Premiums Refunded	4,201.38		4,201.38
" Rents Collected—Rock Island		300.00	300.00
" Miscellaneous Scrap Sales		237.06	237.06
" Cash Received from T. J. Spallacy, Auxiliary Receiver—Connecticut		22,208.31	22,208.31
	$128,517.40	444,020.71	572,538.11
			$585,343.77
CASH DISBURSEMENTS:			
Administrative Expenses—Chicago	347.00	20,350.64	20,697.64
Selling Expenses—Chicago		17,054.85	17,054.85
Manufacturing Expense—Chicago	596.73	7,893.37	8,490.10
" —Rock Island	81.97	9,294.99	9,376.96
" —Moline		3,254.73	3,254.73
" —Davenport		313.37	313.37
" —East Moline		2,345.90	2,345.90

100 STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS BETWEEN FEBRUARY 19, 1925 AND JULY 15, 1925
(Continued)

	From transactions originating prior to Receivership	From transactions originating between Feb. 19 and July 15, 1925	Total
CASH DISBURSEMENTS:			
Pay Rolls—Chicago	$ 10,157.75	36,185.88	46,343.63
" —Rock Island	9,560.10	20,618.59	30,178.69
" —Moline		27,223.03	27,223.03
" —Davenport		20.00	20.00
" —East Moline		10,495.90	10,495.90
Raw Materials—Chicago		3,819.66	3,819.66
" —Rock Island		14,074.82	14,074.82
Property Taxes—Chicago	177.20		177.20
Interest on Bonds—Rock Island		3,125.00	3,125.00
" —Davenport		2,145.00	2,145.00
Notes Payable—Chicago	1,642.39		1,642.39
Interest on Notes Payable—Chicago	77.78		77.78
Credit and Collection Expense—Chicago	100.70		100.70
Exchange—Chicago		42.36	42.36
Capital Stock Transfer Expense—Chicago		297.29	297.29
Employes' Stock Payments Refunded—Chicago	2,456.00		2,456.00
Receiver's Certificate Retired—Chicago		25,000.00	25,000.00
Interest on Receiver's Certificate—Chicago		127.05	127.05
Receivership Expenses—Miscellaneous		2,548.64	2,548.64
Cash Disbursed for Baltic		27,441.53	27,441.53
	$ 25,197.62	233,672.60	$258,870.22
CASH ON HAND—JULY 15, 1925			
Petty Cash—Chicago			$ 74.82
Petty Cash—Rock Island			61.39
Cosmopolitan State Bank—Chicago			23,045.71
Foreman's National Bank—Chicago			201,873.94

101 STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS BETWEEN FEBRUARY 19, 1925 AND JULY 15, 1925 (Continued)

	From Transactions originating prior to Receivership	From transactions originating between Feb. 19 and July 15, 1925	Total
CASH ON HAND—JULY 15, 1925:			
Greenebaum Sons Bank—Chicago			53.79
Second Security Bank—Chicago			237.50
Union Trust Company—Chicago			99 884.72
Noel State Bank—Chicago			1 241.08
			326,473.55
			$585,343.77

(Endorsed)
Filed Aug 10 1925
Charles M. Bates Clerk

Aug 26. 102 And afterwards, to-wit, on the 26th day of August, 1925, this matter coming on to be heard, the following order was entered by the Court:

103 In the District Court of the United States

Northern Division of Illinois

Eastern Division.

Wednesday, August 26, A. D. 1925.

Present: Honorable James H. Wilkerson, District Judge.

United States Worsted Sales Company,
vs.
Daniel Boone Woolen Mills, Inc. } No. 4660.

Upon motion, It is Ordered that the time for presentation of Certificate of Evidence and record for appeal be and the same is hereby extended to October 1, 1925.

78 And on, to-wit, the 17th day of July, 1925, came Daniel V. Harkin and Union Bank of Chicago, Receivers, by their attorneys, and filed in the office of the clerk of said court their certain Petition for Appeal in words and figures as follows, to-wit: Filed 1925.

79 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

United States Worsted Sales Company, *Complainant.* *vs.* Daniel Boone Woolen Mills, Inc., a corporation. *Defendant.*	In Equity No. 4660

To the Honorable James H. Wilkerson, Judge of Said Court:

And now comes Daniel V. Harkin and Union Bank of Chicago as receivers for the defendant, Daniel Boone Woolen Mills, Inc., a corporation, as appointed by the Superior Court of Cook County, Illinois, as complainants and petitioners by their attorneys, Blum, Blum & Delaney, and feeling aggrieved by the final order of this court entered July 9th, A. D. 1925, hereby pray that an appeal may be allowed to them from the said order and decree to the United States Circuit Court of Appeals for the Seventh District, and in this connection with this petition, petitioners herewith present their assignment of errors.

Your Petitioners further pray that an order may be entered fixing the amount of security that may be required by the court on allowing this appeal.

BLUM, BLUM & DELANEY,
Attorneys for Daniel V. Harkin and Union Bank of Chicago, State Court Receivers.

(Endorsed) Filed Jul 17 1925 Charles M. Bates Clerk

By 17. 80 And on, to-wit, the 17th day of July, 1925, came Daniel V. Harkin and Union Bank of Chicago, Receivers, by their attorneys, and filed in the office of the clerk of said court their certain Assignment of Errors in words and figures as follows, to-wit:

81 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

United States Worsted Sales Company, *Complainant.* vs. Daniel Boone Woolen Mills, Inc., a corporation. *Defendant.*	In Equity No. 4660

ASSIGNMENT OF ERRORS

Now come the appellants, Daniel V. Harkins and Union Bank of Chicago, receivers under appointment by order of the Superior Court of Cook County, Illinois, of the assets and property of the Daniel Boone Woolen Mills, Inc., a corporation, by their attorneys, Blum, Blum & Delaney, and in connection with their petition for appeal say in the record and proceedings and in the final order or decree aforesaid manifest error has intervened to the prejudice of the appellant's to-wit:

First: The court erred in overruling the motion of the State Court Receivers to turn over property in the possession of the receivers of the Federal Court to the receivers appointed by the State Court because the State Court had constructive possession of the assets of the defendant corporation when the complaint was filed and process issued and was served in said court, because relief sought and prayer of bill in State Court necessitated the possession by the State Court of the property and assets of the defendant corporation.

Second: The court erred in holding it had jurisdiction over the subject matter as well as the parties because such consent of parties was collusively made as shown by the defendants at the hearing of said motion.

Third: The ruling and the order of the court was against the evidence which was given at the hearing of said cause.

Fourth: The ruling of the court was against the law for the reason the attention of the court was called to the suit pending in the State Court asking for the appointment of a receiver when and at the time receiver was asked for in
82 the Federal Court and when this court was informed and shown by evidence that the consent to the appointment of the receiver in the Federal Court was collusively had it was the duty of the court under the statute to dismiss said suit.

Fifth: The court erred in denying the motion of the State Court receivers for an order on the Federal Court receivers to turn over possession on the ground (whether dismissing suit or not) that from the evidence it appeared that the parties in the Federal Court were improperly joined for the purpose of creating a case cognizable in the said District Court and that said suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, and that said District Court was, therefore, without jurisdiction to withhold possession of siad property from the State Court receivers.

Sixth: The District Court erred in overruling said last mentioned motion of the State Court receivers because by the filing in the State Court of the bill of complaint there filed, the entry therein of the motion for the appointment of receivers and the voluntary appearance of the defendant, The Daniel Boone Woolen Mills, Inc. a corporation, the filing in the State Court of the intervening and supplemental bill of Goldenberg and the adoption thereof by the original complaint and the appointment thereafter by the State Court of receivers of the said Daniel Boone Woolen Mills, Inc. said State Court had constructive possession as of the date of the filing of the bill of complaint in the State Court of the assets of the defendant company in the State of Illinois of which possession it could not lawfully be deprived by the subsequent filing of the bill in the Federal Court and the appointment thereafter in the Federal Court of receivers of the same assets.

Seventh: The District Court erred in overruling said last mentioned motion of the State Court Receivers because under the facts shown by the evidence the officers, directors, members of the executive committee and attorneys pretendedly waiving the defendant company's defense in the said Federal Court and consenting to the appointment of receivers

by the Federal Court had no authority so to do as against said State Court receivers and their attempt so to do was a fraud and imposition upon the court.

Eighth: The District Court erred in holding that the State Court receivers were barred by delay—either delay of the State Court in appointing receivers or of the State Court receivers in filing their petition for possession of the property in question, both because of the evidence disclosed no unreasonable delay and no elements of estoppel in favor of any of the parties and because no such point was raised in either of the answers to the petition and motion of the State Court receivers.

BLUM, BLUM & DELANEY,
Attorneys for Daniel V. Harkin and Union Bank of Chicago State Court Receivers.

(Endorsed) Filed July 17-1925 Charles M. Bates Clerk

83 And on, to wit, the 17th day of July, 1925, came Daniel V. Harkin and Union Bank of Chicago, Receivers, etc. as principals, and United States Fidelity and Guaranty Company as surety, and filed in the office of the Clerk of said Court a certain Bond on Appeal in words and figures following, to wit:

84 Know all Men by these Presents, That we, Daniel V. Harkin and Union Bank of Chicago, Receivers appointed by the Superior Court of Cook County, Illinois of the property and assets of the Daniel Boone Woolen Mills, Inc., a corporation, as principals, and United States Fidelity and Guaranty Company, as sureties, are held and firmly bound unto Edward J. Brundage, Receiver under Federal Court appointment of the property and assets of the Daniel Boone Woolen Mills, Inc., a corporation, in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said Edward J. Brundage, Receiver under Federal Court appointment of the property and assets of the Daniel Boone Woolen Mills, Inc., a corporation, attorneys, executors, administrators, or assigns; to which payment, well and truly to be made we bind ourselves, our heirs executors and administrators jointly and severally firmly by these presents. Sealed with our seals and dated this 16th day of July in the year of our Lord one thousand nine hundred and twenty-five.

Whereas, lately at a session of the District Court of the

United States for the Northern District of Illinois, under date of July 9, 1925 in a suit pending in said Court, between United States Worsted Sales Company, plaintiff, and Daniel Boone Woolen Mills, Inc., a corporation, defendant, a decree was rendered against the said Daniel V. Harkin and Union Bank of Chicago, Receivers appointed by the Superior Court of Cook County, Illinois of the property and assets of the Daniel Boone Woolen Mills, Inc., a corp. and the said Daniel V. Harkin and Union Bank of Chicago, Receivers appointed by the Superior Court of Cook County, Illinois of the property and assets of the Daniel Boone Woolen Mills, Inc., a corporation, having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree of the aforesaid suit, and a citation directed to the said Edward J. Brundage, Receiver under Federal Court appointment of the property and assets of the Daniel Boone Woolen Mills, Inc., a corporation, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof.

Now, the condition of the above obligation is such, That if the said Daniel V. Harkin and Union Bank of Chicago, Receivers appointed by the Superior Court of Cook Co. Ill. of the property and assets of the Daniel Boone Woolen Mills, Inc., a corporation, shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then the above obligations to be void; otherwise to remain in full force and virtue.

DANIEL V. HARKIN, (Seal)
Receivers.
UNION BANK OF CHICAGO, (Seal)
By HARRY G. KEATS,
Assistant Trust Officer
UNITED STATES FIDELITY AND GUARANTY COMPANY, (Seal)
By TIMOTHY E. DUNNE,
Attorney in Fact.

Sealed and delivered in presence of—
JOHN A. MYLES
Approved by—
WILKERSON
Judge.

(Endorsed) Filed Jul 17 1925 Charles M. Bates Clerk

July 17. 85 And on the same day, to-wit: the 17th day of July, 1925, this matter coming on to be heard, the following order was entered by the court:

86 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

July 17, 1925.

Present: Honorable James H. Wilkerson, District Judge.

United States Sales Company, *Complainant,*
vs.
Daniel Boone Woolen Mills, Inc., a corporation. *Defendant.*
} In Equity No. 4660

ORDER.

On the hearing of the petition of Daniel V. Harkin and Union Bank of Chicago, receivers appointed by the State Court of the Daniel Boone Woolen Mills, Inc., a corporation, for appeal to the Circuit Court of Appeals of the Seventh District of the assignment of errors, and upon due consideration of the record of said cause, It Is Ordered that an appeal be allowed to the Circuit Court of Appeals of the Seventh District as prayed for in said petition in accordance with law upon condition that said petitioner and appellants shall give security in the sum of Two Hundred Fifty Dollars ($250.00); that said appellants shall prosecute said appeal to effect and if said appellants fail to make good their plea shall answer unto the appellee for all costs and damages that may be adjudged on account of said appeal.

And the said appellants now present a bond in the sum of $250.00 with U. S. Fidelity & Guaranty Co. as surety and It Is Ordered that same be and is hereby duly approved.

Dated: July 17, 1925.

Enter:

JAMES H. WILKERSON,
Judge.

228 IN THE DISTRICT COURT OF THE UNITED STATES Filed [illegible] 1925

For the Northern District of Illinois

Eastern Division

June Term, A. D. 1925.

United States Worsted Sales Company,
Complainant,
vs.
Daniel Boone Woolen Mills, Inc., a Corporation,
Defendant.
} In Equity No. 4660

PRAECIPE FOR RECORD.

The clerk will make up an authentic transcript of the record in the above entitled cause as quickly as possible and will insert therein:

1. Placita.
2. Bill of Complaint.
3. Appearance of the defendant.
4. Answer and consent of defendant.
5. Order for appointment of receiver.
6. Order approving bond of receiver.
7. Report of receiver showing who had possession of assets of the defendant.
8. Motion and petition of State Court receivers for an order on the Federal Court receiver to turn over property to State Court receivers, etc.
9. Order fixing time of answer of all parties to the State Court receivers' petition.
10. Answer of the Federal Court receiver.
11. Answer of the complainant.
12. Answer of the defendant.
13. Amended intervening petition of David Leibwitz and Jacob Rosenbaum, order of court allowing same to be filed and rule on all parties to answer.

13a. State Court Receivers' Motion to Strike.

229 14. Objection of counsel overruling motion and petition of State Court receivers and exceptions.

15. Statement and certificate of evidence.

15a. Order extending time to file.

16. Petition for appeal.
17. Order allowing appeal.
18. Approving of order and filing appeal bond.
19. Appeal Bond.
20. Assignment of Errors.
21. Citation.

BLUM, BLUM & DELANEY,
Attorneys for State Court Receivers.

(Endorsed) Filed Aug 17 1925 Charles M. Bates Clerk

230 Northern District of Illinois } ss:
Eastern Division }

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled United States Worsted Sales Company, vs. Daniel Boone Woolen Mills, Inc., Equity, No. 4660, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 16th day of September, A. D. 1925.

CHARLES M. BATES,
Clerk.

(Seal)

231 United States } ss.
of America, }

The President of the United States, To Barrett & Barrett and L. L. Cowan, Solicitors for Daniel Boone Woolen Mills, Inc., Newman, Poppenhusen, Stern & Johnson, Solicitors for Complainant, Thos. S. Hogan, Solicitor for Interveners, Edward J. Brundage, Receiver for defendant in Federal Court, Ralph Potter, Solicitor for Receiver in Federal Court, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the

date hereof, pursuant to appeal bond, petition and order entered filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein United States Worsted Sales Company is complainant and Daniel Boone Woolen Mills, Inc., a corporation, is defendant: in the matter of motion and petition of Union Bank of Chicago and Daniel V. Harkin, receivers appointed by State Court of Cook County, Illinois, and their appeal from court's decision thereon, and you are directed to show cause, if any there be, why the opinion and order rendered against the said Union Bank of Chicago and Daniel V. Harkin, receivers appointed by State Court of Cook County, Illinois, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James H. Wilkerson, Judge of the District Court of the United States, this 17th day of July, in the year of our Lord one thousand nine hundred and twenty-five.

JAMES H. WILKERSON,
U. S. District Judge.

On this Fifteenth day of August, in the year of our Lord one thousand nine hundred and twenty-five, personally appeared Arthur Steffen before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Barrett & Barrett and L. L. Cowan, Solicitors for Daniel Boone Woolen Mills, Inc., Newman, Poppenhusen, Stern & Johnson, Solicitors for Complainant, Thos. S. Hogan, Solictor for Interveners, Edward J. Brundage Receiver for defendant in Federal Court, and Ralph Potter, Solicitor for Receiver in Federal Court.

Sworn to and subscribed the fifteenth day of August, A. D. 1925.

JEANNETTE GARDNER,
(Seal) *Notary Public.*

(Endorsed) No. 4660 Equity District Court of the United States, Northern District of Illinois, Eastern Division. United States Worsted Sales Company vs. Daniel Boone Woolen Mills, Inc., a corporation. Citation. Returnable _____ 19____ _____ Clerk. Filed Aug 15 1925 at ____ o'clock ____ M. Charles M. Bates Clerk Blum Blum & DeLaney Sol. for State Ct Receivers.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 159, inclusive, contain a true copy of the printed record, printed under my supervision and filed September 26, 1925, on which the following entitled cause was heard and determined:

In the Case of

Daniel V. Harkin and Union Bank of Chicago, Receivers, etc.

vs.

Edward J. Brundage, Receiver, etc., *et al.*

No. 3642, October Term, 1925, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-first day of June, A. D. 1926.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court
1 of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago in said Seventh Circuit on the seventh day of October, 1924, of the October Term in the year of our Lord one thousand nine hundred and twenty-four and of our Independence the one hundred and forty-ninth.

And afterwards, to wit: On the twelfth day of August, 1925, the following further proceedings were had and entered of record, to wit:

Wednesday, August 12, 1925.

Court met pursuant to adjournment.

Present:

Hon. Samuel Alschuler, Circuit Judge.
Edward M. Holloway, Clerk.

Daniel V. Harkin, *et al.*		Appeal from the District Court of the United States for the Northern District of Illinois; Eastern Division.
3642	*vs.*	
Edward J. Brundage, Receiver, *et al.*		

On motion of Mr. J. V. DeLaney, solicitor for Daniel V. Harkin and Union Bank of Chicago, it is hereby ordered that the time for filing the transcript of the record of the District Court in the above entitled cause be, and it is hereby extended to and including September 1, 1925.

And on the same day, to wit: On the twelfth day of August, 1925, there was filed in the office of the clerk of this court an appearance of counsel for Appellant, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1924.

In the matter of the appeal of Daniel V. Harkin, *et al.*, Receivers.

Daniel V. Harkin, *et al.*,
Appellants.
3642 *vs.*
Edward J. Brundage, Receiver, *et al.*,

The Clerk will enter my appearance as Counsel for the Appellant.

H. S. Blum,
2 A. M. Blum,
J. V. DeLaney,
110 S. Dearborn Street.

Endorsed: Filed August 12, 1925, Edward M. Holloway, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago in said Seventh Circuit on the sixth day of October, 1925, of the October term in the year of our Lord one thousand nine hundred and twenty-five and of our Independence the one hundred and fiftieth.

And afterwards, to wit: On the twentieth day of October, 1925, there was filed in the office of the clerk of this court an appearance of counsel for Intervening Petitioners, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1925.

No. 3642 — United States Worsted Sales Company, *vs.* Daniel Boone Woolen Mills, Ins.

The Clerk will enter my appearance as Counsel for the Intervening Petitioners.

GEORGE F. MULLIGAN,
#816 Ashland Block.

Endorsed: Filed October 20, 1925. Edward M. Holloway, Clerk.

And afterwards, to wit: On the seventeenth day of November, 1925, there was filed in the office of the clerk of this court an appearance of counsel for Appellees, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1925.

Daniel V. Harkin, *et al.*,
Appellants.
No. 3642 *vs.*
Edward J. Brundage, *et al.*,
Appellees.

The Clerk will enter my appearance as Counsel for the Appellees.

RALPH F. POTTER,
209 So. LaSalle Street.

3 EDWARD R. JOHNSTON,
11 St. LaSalle Street.
Chicago, Illinois.

Endorsed: Filed November 17, 1925. Edward M. Holloway, Clerk.

And afterwards, to wit: On the twenty-fourth day of November, 1925, there was filed in the office of the clerk of this court a certain Motion, which said Motion is in the words and figures following, to wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

United States Worsted Sales Company, *Plaintiff.* *vs.* Daniel Boone Woolen Mills, Inc. *Defendant.* Daniel V. Harkin and Union Bank of Chicago, Receivers, etc., *Appellants.* *vs.* Edward J. Brundage, Receiver, etc., *et al.* *Appellees.*	No. 3642.

MOTION.

Now comes the appellants and move the court that the appellants be given five (5) days additional time in which to file reply briefs for the reason that the brief filed by appellees contains ninety-three (93) pages and raises a number of questions of law, which will require more time than the rules give for appellant to sufficiently meet the propositions raised in said brief.

Appellants further move the Court for permission to file a certified copy of a petition and motion filed by appellants here, which petition was filed in the District Court on July 17, 1925, and the answer thereunto by appellees here, for the reason that in their brief herein filed, the appellees set up

the fact that the question of jurisdiction was not properly raised by the motion to turn over the assets of the State Court Receivers in the District Court, and in their answer to appellants' petition to strike the claims, appellee, answers that this matter has been raised in the District Court and
4 is raised adjudicata as to the motion to strike said claims.

Appellants further state that they feel that this record is necessary and essential for the proper consideration of this court of the appeal in this matter.

BLUM, BLUM & DELANEY,
Solicitors for Appellants.

Endorsed: Filed November 24, 1925. Edward M. Holloway, Clerk.

And on the same day, to wit: On the twenty-fourth day of November, 1925, the following further proceedings were had and entered of record, to wit:

Tuesday, November 24, 1925.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, *Circuit Judge*, presiding.
Hon. George T. Page, *Circuit Judge*
Hon. Albert B. Anderson, *Circuit Judge*
Edward M. Holloway, *Clerk*
Palmer E. Anderson, *Marshal*

Before:

Hon. Samuel Alschuler, *Circuit Judge*

Daniel V. Harkin, *et al.*, etc.,	}	Appeal from the District Court of the United States for the Northern District of Illinois; Eastern Division.
3642 *vs.*		
Edward J. Brundage, Receiver, etc.		

On motion of counsel for appellants, it is ordered that the time for filing a reply brief for appellants in this cause be, and the same is hereby extended ten (10) days.

Counsel for appellants now present a motion for permission to file a certified copy of a petition and motion filed by appellants which petition was filed in the District Court on July 17, 1925, and the answer thereunto by appellees, which said motion is entered and continued to the hearing on the merits of this cause.

It is further ordered that this cause be set down for hearing on Thursday, January 7, 1926.

And afterwards, to wit: On the ninth day of December, 1925, the following further proceedings were had and entered of record, to wit:

Wednesday, December 9, 1925.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, *Circuit Judge*, presiding
Hon. Evan A. Evans, *Circuit Judge*
Hon. George T. Page, *Circuit Judge*
Hon. Albert B. Anderson, *Circuit Judge*
Edward M. Holloway, *Clerk*
Palmer E. Anderson, *Marshal*

Before:

Hon. Samuel Alschuler, *Circuit Judge*

Daniel V. Harkin,	}	Appeal from the District Court of the United States for the Northern District of Illinois; Eastern Division.
3642 *vs.*		
Edward J. Brundage, etc.		

It is now here ordered that this cause be, and the same is hereby re-set for hearing on Friday, January 8, 1926.

And afterwards, to wit: On the eighth day of January, 1926, the following further proceedings were had and entered of record, to wit:

Friday, January 8, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, *Circuit Judge*, presiding
Hon. Evan A. Evans, *Circuit Judge*
Hon. George T. Page, *Circuit Judge*
Hon. Albert B. Anderson, *Circuit Judge*
Edward M. Holloway, *Clerk*
Palmer E. Anderson, *Marshal*

Before:

Hon. Samuel Alschuler, *Circuit Judge*
Hon. Evan A. Evans, *Circuit Judge*
Hon. George T. Page, *Circuit Judge*

Daniel V. Harkin, *et al.*		Appeal from the District Court of the United States for the Northern District of Illinois; Eastern Division.
3642	*vs.*	
Edward J. Brundage, Receiver, etc.		

Now this day come the parties by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Lloyd C. Whitman, counsel for appellants, and by Mr. Edward R. Johnston, counsel for appellee, and the Court having heard the same takes this matter under advisement.

And afterwards, to wit: On the fourteenth day of April, 1926, there was filed in the office of the clerk of this court, the opinion of the Court, which said opinion is in the words and figures following, to wit:

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 3642 October Term 1925, April Session 1926.

Daniel V. Harkin and Union Bank of Chicago, Receivers, etc., *Appellants.*
vs.
Edward J. Brundage, Receiver, etc., *et al.*, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois; Eastern Division.

April 14, 1926.

Before ALSCHULER, EVANS and PAGE, *Circuit Judges.*

EVANS, *Cir. J.*: This appeal involves a controversy between appellants, who were appointed receivers of the Daniel Boone Woolen Mills, Inc., by the Superior Court of Cook County, Ill., upon a bill filed by one Harry Hurwitz, a stockholder, and appellee, the receiver appointed by the United States District Court for the Northern District of Illinois upon the suit of the United States Worsted Sales Company, a creditor. Adopting the language of counsel, appellants will be referred to as the state court receivers, appellee as the Federal court receiver, and the Daniel Boone Woolen Mills, Inc., as the debtor.

The creditor in the Federal suit was a New York corporation, and its claim exceeded six thousand dollars. The allegations of the bill were sufficient to justify the appointment of a receiver, which was one of the reliefs sought. Debtor appeared in this suit, filed an answer admitting all of the allegations of the bill, and consented to the appointment of a receiver.

3642 2

8 Nine days subsequent, appellants were named receivers in the state court.

Immediately upon his appointment as receiver, appellee took possession of the assets of the debtor, and thereafter, upon their appointment appellants filed a petition in the United States District Court asking that the property of the said debtor be turned over to them, and also that appellants' attorneys be permitted to appear in the Federal Court for the corporation.

This appeal is from an order denying petitioners any relief.

Appellee, having been first appointed receiver, and having taken possession of the property of the debtor prior to appellants' appointment, would ordinarily be entitled to hold it. Appellants, however, contend that this rule must yield in view of the peculiar facts present in the instant suit. They point out that their suit was filed in the State court prior to the institution of the proceedings in the Federal court, and likewise, their prior and pending application for the appointment of a receiver invoked the so-called constructive possession theory, for which they cite and rely upon *Harmer* v. *Hegnes*, 269 Fed. 537.

Appellee answers by asserting that the bill, as originally filed in the state court, did not ask for the appointment of a receiver, and no facts were alleged which would have justified the court in appointing a receiver, citing Sections 53 and 54 of the Corporation Act of 1919, *People* v. *Weigley*, 155 Ill. 491, 504; *Gilbert* v. *Block*, 51 Ill. App. 516; *Blanchard Bro. & Lane* v. *The S. G. Gay Co.*, 289 Ill. 413; *Coquard* v. *National Linseed Oil Co.*, 171 Ill. 480, 485.

We are inclined to accept the view that appellants' position should be determined not merely upon the complaint as filed, but in the light of the pleadings *together with the pending motion* of the stockholders for the appointment of a receiver. This motion carried with it the possibilities of amended pleadings and supporting affidavits. And this view is particularly persuasive in view of the proceedings that occurred in the

State court when a continuance of the motion for the appointment of a receiver was granted at the request of the debtor.

Appellee further contends, however, that the two suits, one in the State court brought by the stockholder and the other in the Federal court brought by the creditor for himself and for all others similarly situated, were entirely different, not only as to parties, but as to purpose, subject matter and re-

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9 lief, and therefore, there was no conflict of jurisdiction between the two courts. 3642

An examination of the cases, *Empire Trust Co.* v. *Brooks*, 232 Fed. 641; *Palmer* v. *Texas*, 212 U. S. 118, 129; *Wabash Railroad* v. *Adelbert College*, 208 U. S. 609; *Farmers' Loan & Trust Co.* v. *Lake Street Rwy. Co.*, 177 U. S. 51; *Pacific Live Stock Co.* v. *Oregon Water Bd.*, 241 U. S. 440; *Moran* v. *Sturges*, 154 U. S. 283; 15 C. J. pp. 1163, 1177; convinces us that if the two suits were different, there was no conflict of jurisdiction, and the court which first acquired jurisdiction over the *res* by actual seizure through its receiver should retain jurisdiction.

The suit instituted by the stockholder in the State court was different from that brought by a creditor in the Federal court. *Moran* v. *Sturges*, *supra*, and *Empire Trust Co.* v. *Brooks*, *supra*. In fact, it would not have been possible for the stockholder to maintain a suit such as was brought in the Federal court. *People* v. *Weigley*, 155 Ill. 504.

Appellants further contend, however, that the suit in the Federal court was brought in violation of the pledge by the debtor's attorney given to the State court, and upon which the continuance of the receivership motion was granted. We fully agree with apellants' counsel that there is no basis for an alleged misunderstanding as to the effect of the assurances thus given, upon which assurances a continuance of the hearing was had. We, furthermore, agree that such counsel spoke for and bound the debtor. He could not, however, and did not, represent creditors who were not parties to the state court suit, and whose interests were adverse to the debtor. In other words, the creditors' right to bring this suit could not be defeated or affected by the conduct of counsel for the debtor. Surely, punishment for professional misconduct and bad faith of counsel at the time representing the debtor corporation can not and should not be visited upon creditors who were not parties to the suit, whose interests were hostile to the corporation, and who did not even know of the proceedings that occurred in the State court.

Appellants likewise contend that the complaint filed in the Federal court failed to allege that the creditor's obligation was past due. The plaintiff alleged:

> "That the defendant *is indebted* to the complainant for goods, wares and merchandise heretofore sold and delivered. . . in the sum of $6176.43, no part of which has been paid, and there are no off-sets or counterclaims thereto."
>
> 3642 4
>
> "The ground upon which the jurisdiction of the court depends in this suit is the diversity of citizenship of the complainant and of the defendant, and the *amount in controversy* herein exceeds the sum of value of three thousand dollars, exclusive of interest, costs and expenses. This suit is brought for the purpose of enforcing the claim of complainant against the defendant. . ."

Upon the hearing in the court below, there was considerable evidence taken, and other interested parties intervened and became parties plaintiff. The testimony leaves no doubt as to the past due character of the account.

The fact that appellants' counsel did not raise this question until they reached this court, and then only in their reply brief, indicates that they, as well as the District Court and the parties, construed the word "indebted" to mean a debt presently payable. In *Trowbridge* v. *Sickler*, 42 Wis. 417, such was its accepted meaning, and while we are not required to so hold in this case, we have no hesitancy in saying that at this late date the parties can not and should not be permitted to give a more technical or limited construction to this word. There is no question but what both the complainant and the defendant construed the word "indebted" to mean "presently indebted."

It is also urged that the Federal court was without jurisdiction because the plaintiff and the debtor entered into a collusive agreement to bring this suit, in violation of Section 37 of the Judicial code. In other words, there was no real controversy between the plaintiff and the defendant in the Federal court.

It is worthy of notice that this point was not made in the District Court. However, the question is one of jurisdiction, and can be raised at any time, and this court should and will take notice of it *sua sponte*.

After a careful examination of the evidence, we conclude there is sufficient proof to support the court's jurisdiction.

It is true the debtor sought the plaintiff, a creditor, and urged it to bring the suit; that the debtor supplied a soliciting attorney with the names of likely creditors, and was instrumental in urging the creditor to go to an office, where one attorney was drawing the bill, although no party plaintiff had as yet been found. On the other hand, it appears that the creditor did not know of the condition of debtor's affairs,

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11 was not aware of the officers' gross mismanagement, or 3642 of the tremendous losses of the preceding year, until informed by the debtor's officers. It was a bona fide creditor with a claim in excess of three thousand dollars, which indebtedness arose from merchandise sales. Its residence supplied the diversity of citizenship necessary to invoke the Federal court's jurisdiction. When it was confronted with a statement of the condition of the debtor's affairs, and of the precarious state of its account, it was required to take some steps to protect its claim. It had the undoubted right to select the forum wherein it would seek its redress, and because of the existing facts, could proceed either in the Federal court or in the State court.

Upon this record we can not say that merely because the debtor thus advised the creditor of the true state of its affairs and urged it to take action to protect its right, that there was not a real,—a substantial dispute or controversy between the two parties.

That the conduct of debtor's first counsel (not the counsel appearing in this court) was far from commendable, is unfortunately, most apparent. It is, happily, not a frequent occurrence that an attorney for a debtor seeks the creditor and urges him to bring suit against his client, or turns over his client's list of creditors to an attorney soliciting business, to say nothing of the violated pledge to the judge and opposing counsel. Moreover, good faith required this counsel to have advised the Federal District Court of the pendency of the State court proceedings.

The case is one where in their determination to control the receivership, counsel proceeded with such speed and zeal that the code of professional ethics was entirely ignored and forgotten. Counsel should avoid these hurried *ex parte* applications for friendly receivers. In fact, there should be no "friendly receiverships." Whenever possible, notice should be given to any and all interested parties. When the debtor corporation appears, however, and consents to such apointment, the court must rely on counsel to inform it as to all the facts. If essential facts are deliberately withheld, counsel

may well forfeit his right to practice further, or be otherwise disciplined.

Notwithstanding the prejudice which this conduct has created, we have approached the question with the understand-

3642 6

12 ing that the client's rights rather than attorney's conduct must be the basis for the determination of this litigation.

Counsel for appellants ask to be substituted for debtor's counsel in this litigation. Were this request a discretionary matter (and we do not believe that it is) it could best be handled by the District Court. But it is not a matter calling for the exercise of discretion.

The decree is affirmed.

13 And on the same day, to wit: On the fourteenth day of April, 1926, the following further proceedings were had and entered of record, to wit:

Wednesday, April 14, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, *Circuit Judge*, presiding
Hon. Evan A. Evans, *Circuit Judge*
Hon. George T. Page, *Circuit Judge*
Hon. Albert B. Anderson, *Circuit Judge*
Edward M. Holloway, *Clerk*
Palmer E. Anderson, *Marshal*

Before:

Hon. Samuel Alschuler, *Circuit Judge*
Hon. Evan A. Evans, *Circuit Judge*
Hon. George T. Page, *Circuit Judge*

Daniel V. Harkin and Union Bank of Chicago, Receivers appointed by the Superior Court of Cook County, Illinois, of the property and assets of the Daniel Boone Woolen Mills, Inc., a corporation. 3642 *vs.* Edward J. Brundage, Receiver under Federal Court appointment of the property and assets of the Daniel Boone Woolen Mills, Inc., a corporation.	Appeal from the District Court of the United States for the Northern District of Illinois; Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois; Eastern Division, and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and decreed by this Court that the order or decree of the said District Court in this cause appealed from be, and the same is hereby affirmed with costs.

And afterwards, to wit: On the third day of May, 1926, there was filed in the office of the clerk of this court an additional appearance of counsel for appellants, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1924.

United States Worsted Mills Sales Co.,
No. 3642 *vs.*
Daniel Boone Woolen Mills, Inc.,

14 The Clerk will enter my appearance as additional counsel for the appellants.

BERNHARDT FRANK,
548 Marquette Building,
Chicago, Illinois.

Endorsed: Filed May 3, 1926. Edward M. Holloway, Clerk.

And afterwards, to wit: On the fourth day of May, 1926, there was filed in the office of the clerk of this court a certain petition for a rehearing, which said petition for a rehearing is in the following words and figures, to wit:

15

No. 3642

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH JUDICIAL CIRCUIT.

OCTOBER TERM, A. D. 1924.

UNITED STATES WORSTED SALES COMPANY, *Plaintiff.*

vs.

DANIEL BOONE WOOLEN MILLS, INC., *Defendant*

DANIEL V. HARKIN and UNION BANK OF CHICAGO, Receivers, etc., *Appellants,*

vs.

EDWARD J. BRUNDAGE, Receiver, etc., et al., *Appellees.*

Appeal from the District Court of the United States, for the Northern District of Illinois, Eastern Division.

Honorable Jas. H. Wilkerson, Judge Presiding.

PETITION OF DANIEL V. HARKIN AND UNION BANK OF CHICAGO, RECEIVERS, ETC., APPELLANTS, FOR REHEARING.

BERNHARDT FRANK.
HENRY S. BLUM.
ALBERT M. BLUM.
JOHN V. DE LANEY.

LLOYD C. WHITMAN.
Of Counsel.

ATTORNEYS FOR APPELLANTS.

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. The opinion, in finding that if the two suits were different there was no conflict of jurisdiction and that the Court which first acquired jurisdiction over the res by actual seizure through its receiver should retain jurisdiction, is contrary to the authorities cited in support of that finding 7
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(b) Palmer v. Texas, 212 U. S. 118 11
(c) Wabash Railroad v. Adalbert College, 208 U. S. 38 13
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(e) Pacific Live Stock Co. v. Oregon Water Board, 241 U. S. 440 15
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. The finding of the opinion that the two suits were different in material respects, for the purposes of the determination of the issues presented in this cause is contrary to the ruling of the Circuit Court of Appeals for the Third Circuit in Ward v. Foulkrod, 264 Fed. 627. In that case a conservation bill in a federal court and a stockholders' bill in a state court were held to present the same controversy for the purposes of decision on the right of one court to take possession of property without interference through actual seizure by another court in a suit commenced after the filing of the suit in the first court. The subject matters of both suits for that issue was held to be possession of the corporation property 17

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V. The opinion in finding that there is no question but that both the complainant and defendant construed the word "indebted" to mean "presently indebted" misapprehends the record. The pleader itself (complainant) as shown by the context of the bill construed it otherwise than as found in the opinion. The court erroneously attributes weight to the fact that the defendant did not question the nature of the debt—thereby using a presumption contrary to all rules for testing federal jurisdiction 3

CASES CITED.

Empire Trust Co. v. Brooks, 232 Fed. 641 7, 8, 9, 11, 12, 17, 1
Farmers' Loan & Trust Co. v. Lake St. Ry. Co., 177 U. S. 51 ..... 7, 8, 1
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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH JUDICIAL CIRCUIT.

OCTOBER TERM, A. D. 1924.

UNITED STATES WORSTED SALES COMPANY, *Plaintiff.* vs. DANIEL BOONE WOOLEN MILLS, INC., *Defendant.* DANIEL V. HARKIN and UNION BANK OF CHICAGO, Receivers, etc., *Appellants.* vs. EDWARD J. BRUNDAGE, Receiver, etc., et al., *Appellees.*	Appeal from the District Court of the United States, for the Northern District of Illinois, Eastern Division. Honorable Jas. H. Wilkerson, Judge Presiding.

PETITION OF DANIEL V. HARKIN AND UNION BANK OF CHICAGO, ETC., APPELLANTS, FOR REHEARING.

Appellants, the State Court receivers, respectfully petition for a rehearing of this cause.

Before undertaking to point out the particulars wherein the opinion overlooks or misapprehends the record, a review of the findings of law therein will clarify the situation.

19 **The findings of law are with appellants.**

A.

As to the conflict of jurisdiction.

The opinion finds:

1. That the filing of the bill in the state court and the proceedings had thereunder including the filing of the

motion for and granting of the continuance created a suit wherein the doctrine of arrest of property was applicable;

2. That, in applying the doctrine of arrest of property, appellants' right to possession should be determined as of the time of the filing of the bill, motion for the appointment of a receiver, and the appearance of the debtor corporation to procure a continuance for the postponement of the appointment of a receiver;

3. That, if the suits had been similar, by the application of the doctrien of arrest of property the rights of appellants (state receivers) to possession would have prevailed over actual seizure by appellees (federal receivers).

In applying these findings but concluding adversely to the state court proceedings, the court not only overlooks essential facts in the record (which make the two proceedings similar), but even misapprehends the true nature of both proceedings. In particular, it overlooks the fact that in both suits the real and only substantial controversy was *the taking of possession of the same property by the court;* that the state court proceeding was a derivative suit in which the corporation, *formally* a defendant, was *actually* the plaintiff; and that federal jurisdiction was acquired solely by the consent of the same corporation (debtor) given by it after it had in the state court theretofore divested itself of the power to give such consent.

We contend:

(*a*) That the decisions cited in the opinion conclusively prove that the test of conflict of jurisdiction laid down by the Supreme Court of the United States (when the doctrine of arrest of property is involved), is *not the similarity* of the suits, but (assuming the existence of a dissimilarity of suits), the test is: whether there is a potential power in the one court to take possession of specific property in the suit pending before it, which is interfered with by the other court (having no superior jurisdiction or prior right to possession) through actual seizure under a suit later started.

(*b*) That the two suits present such a conflict of jurisdiction, as defined by the Supreme Court of the United States, and that under that test the state court proceeding must prevail.

B.

As to collusively acquired federal jurisdiction in violation of Section 37 of the Judicial Code.

The opinion finds:

1. That the question of collusively acquired federal jurisdiction may be raised for the first time in the reviewing court by a party or by the court itself.

In applying this finding but in concluding adversely to the state court proceeding, the court overlooks the fact that the state court proceeding was a stockholders' derivative proceeding to enforce corporate rights and to prevent waste and dissipation of corporate assets, in which the corporation, though formally a defendant, was actually the plaintiff; and that in the same stockholder's suit the corporation had already recognized, by its appearance and the power of
21 the state court to take possession of its property all of which facts were known to both the creditor and the federal court. Moreover, in the same suit, the corporation procured a postponement of the actual seizure of its property by the state court upon an express promise by it (the corporation) given to the court itself, that it (the corporation) would not during such postponement interfere with such power of the state court. During the continuance of this promise, any action by the corporation (disturbing the control of its property in violation of such promise to the state court), taken by it (the corporation), and which action is a *necessary element* to create federal jurisdiction necessarily becomes a fraud on the state court and necessarily taints and vitiates the federal jurisdiction so acquired.

We contend:

(*a*) That the same facts which create the conflict of jurisdiction under the test laid down by the Supreme Court, as above defined, necessarily make the federal proceeding one in which the federal jurisdiction is collusively invoked by the parties to such federal proceeding in violation of Section 37 of the Judicial Code. This conclusively follows from the fact that federal jurisdiction is admittedly acquired solely by the act of consent by the debtor corporation.

This consent to take possession of its property, creating such federal jurisdiction, was given only after it (the debtor

corporation) had already promised the state court that it would not take any action to defeat the state court's right to such possession. This said consent by the debtor to take possession of its property, creating such federal jurisdiction was given by it (the debtor) and accepted by the creditor and by the federal court itself only after the creditor and the court both had knowledge of the fact that the debtor
22 had already been made a party to a stockholders' derivative suit. In this derivative suit, the defendant though formally a defendant was in fact the plaintiff and in this derivative suit there was then pending a proceeding to take possession of the same property as that involved in the federal court, and in this proceeding the actual seizure of the property by the state court had been deferred by motion to which the same debtor was itself a party.*

---

*The facts of knowledge by the creditor and by the federal court of the pendency of the state court proceeding and the motion for a continuance as appears in the record are:

Record 9: The federal bill of complaint was signed by Greensfelder & Grand, as attorneys for the creditor.

Record 84: Testimony of Cowan, attorney for debtor:

"He (Grand) told me (Cowan) that he (Grand) had read in the St. Louis newspapers of the application for a receiver in the state court * * * He (Grand) asked me what was taking place in the state court and I (Cowan) told him."

Record 87: Testimony of Cowan, continued:

"I think Mr. Solomon (vice-president of the debtor company) and Mr. Grand (attorney for the creditor) explained to Mr. Phillipson (authorized agent of the creditor who signed the federal bill in its behalf, Rec. 9) that he (Mr. Grand) wanted a non-resident creditor to join in the suit against Daniel Boone Woolen Mills, Inc.; that the law firm of Newman, Poppenhusen, Stern & Johnston (who also signed the creditors' bills as attorneys for plaintiff) were associated with Mr. Grand in what they were doing."

Record 93: Testimony of Cowan, continued:

"I think I (Cowan) told Mr. Johnston (attorney for creditor) or Mr. Grand (attorney for creditor), but I don't remember, that there had been a bill filed in the state court and that the motion for a receiver had been continued * * *. I don't know whether I told both Mr. Johnston or Mr. Grand that the motion was pending in the State court. I think I told Mr. Grand but I am not sure I told Mr. Johnston. I told them why it (the motion) had gone over and when it was set to be heard."

Record 102: Testimony of Solomon, vice president of the debtor corporation:

"Along in February I heard of a motion being made in the state court for the appointment of a receiver * * * (104) I don't remember whether I told him (Phillipson) there was an application pending for the appointment of a receiver in the state court. I think I told him that one had been filed."

Record 112: Affidavit of Edward H. Johnston, attorney for creditor:

"That at the time of preparation and filing of said bill of complaint the complainant and the solicitors for the complainant had no knowledge or information concerning the bill of complaint filed * * * in the Superior

C.

As to want of federal jurisdiction.

The opinion finds:

1. That want of federal jurisdiction may be raised for the first time in the reviewing court by the parties or by the court itself.

In applying this finding but in again concluding adversely to the state court proceeding, the opinion assumes the existence of facts, not found in the record, to wit: *any evidence* of the maturity of the debt. So, too, the court fails to apply the rules governing the test of federal jurisdiction, but contrary to settled authority, applies rules in aid and to further federal jurisdiction, not otherwise existing.

We contend:

(*a*) That there is *not a scintilla of evidence* to show that the debt which was used as the basis to confer federal jurisdiction was DUE; and further, the word "INDEBTED," as defined by the pleader himself (creditor) narrows and restricts the use of the word "debt" to mean an unmatured obligation and excludes the possibility of any construction that the debt was *due*.

23

As the debt was not due, the creditor had no right to payment or to sue for the enforcement of any right to pay-
24 ment. As the suit and application for receiver in the federal court was for the conservation of corporate assets (for the benefit of stockholders and creditors) the federal suit did not involve a controversy between the creditor

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Court of Cook County of Illinois * * * save and except such facts as were disclosed by the record in said court, to wit: that on the 14th day of February, 1925, one Harry Hurwitz * * * had filed his certain bill of complaint against the Daniel Boone Woolen Mills, Inc., in the Superior Court of Cook County; that on the 16th day of February, 1925, application had been made by the solicitors for said Harry Hudwitz for the appointment of a receiver for Daniel Boone Woolen Mills, Inc., by said court upon said bill of complaint, and that the hearing upon said motion had been continued by said court to the 21st day of February, 1925.

"That upon presenting to the Honorable James H. Wilkerson, one of the judges of this court, the motion of the complaint herein for the appointment of a receiver, affiant, as one of the solicitors for said complainant, disclosed to the said Honorable James H. Wilkerson all of the facts known to the complainant and its solicitors, to wit: the fact of the filing of said bill in the Superior Court of Cook County by said Harry Hurwitz, the general character and nature of said bill, the fact that a motion had been made thereon for the appointment of a receiver, and that said motion had been continued for hearing until the 21st day of February, 1925."

and debtor but was a joint action by the creditor and debtor *in which action by both* was a condition precedent to federal jurisdiction. There was, therefore, no controversy and the federal court had no jurisdiction.*

I.

The opinion, in finding that if the two suits were different there was no conflict of jurisdiction and that the court which first acquired jurisdiction over the res by actual seizure through its receiver should retain jurisdiction, is contrary to the authorities cited in support of that finding.

The opinion recites (p. 3):

> "An examination of the cases, *Empire Trust Co.* v. *Brooks*, 232 Fed. 641; *Palmer* v. *Texas*, 212 U. S. 118, 129; *Wabash Railroad* v. *Adalbert College*, 208 U. S. 38; *Farmers' Loan & Trust Co.* v. *Lake Street Rwy. Co.*, 177 U. S. 51; *Pacific Live Stock Co.* v. *Oregon Water Board*, 241 U. S. 440; *Moran* v. *Sturges*, 154 U. S. 283; 15 C. J. pp. 1163, 1177, convinces us that if the two suits were different, there was no conflict of jurisdiction, and the Court which first acquired jurisdiction over the *res* by actual seizure through its receiver should retain jurisdiction."

We submit, the above, as shown by the cases cited therein is true only in the following instances:

(*a*) When the Court in which the prior bill was filed could not legally have jurisdiction of the *res* (*i. e.*, a maritime case in the state court, *Moran* v. *Sturges*, *supra*);

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* See testimony of Phillipson (authorized agent who signed bill of complaint for creditor) at page 92 of the Record:

"Mr. Grand and Mr. Cowan left the room and Mr. Solomon (Vice-President of the debtor) said he wanted me (Phillipson) to do him a favor. I said I would if I could. He said the affairs of the Boone Woolen Mills were in bad shape * * * and that it was necessary to apply for a receiver and that they (Grand, attorney for the creditor and Cowan, attorney for the debtor) wanted to apply for a receiver in the federal court for the conservation of assets for the benefit of creditors and stockholders. He (Solomon) says, 'Will you (Phillipson) sign a petition for me to do that?' I says 'I can't sign a petition, Frank, without authority from New York.' * * * So I went downstairs and put in a long distance with New York * * * and then when I reached them (meaning New York) the next morning they asked me what was the best thing to do. I said the best thing to do was to go ahead and apply for the receiver, and they said to go ahead and do whatever I thought was right, to handle the way I would handle it for myself. Now that is the way I came into the case, and that is the method I applied for the receiver."

(*b*) When the Court in which the prior bill was filed entertains jurisdiction of a proceeding by a junior lienholder, or a simple contract creditor or a stockholder in which the right to assume jurisdiction over the *res* is junior to and subject to a prior and superior right to such possession theretofore given by the owner of the property in favor of the person bringing the later suit to enforce such right (*i. e.*, in *Mortgage case; Empire Trust Co. v. Brooks*).

The affirmative principle which these cases likewise establish is that: In a conflict between two courts (neither one of which has a superior jurisdiction to the other by statute and neither one of which has a prior right to possession given by the owner of the property before the commencement of the suits), each having jurisdiction over its own subject matter, though the cases are different, but where in each suit the possession of the same property is necessary the Court which first acquired jurisdiction of its suit has from the inception thereof,—by its potential power to arrest the property,—a control over the property superior to and to the exclusion of the actual seizure of the property by the other
26 court in a suit later started.

The rule laid down in the opinion covers only those exceptions wherein there can not be an arrest of property; *i. e.* where the Court seeking to take the property away from the other was (*a*) powerless in law to take possession of the property for want of jurisdiction over the possession thereof (maritime cases), or (*b*) where the property had already been given to the other Court by the prior act of the owner of the property.

With these principles in mind let us proceed to analyze the cases cited in the opinion.

(a) Empire Trust Co. v. Brooks, 232 Fed. 641.

The federal proceeding in that case was a bill to foreclose a mortgage and the state court proceeding was a bill by a stockholder, under a Texas statute, for the winding up of th corporation.

The *Empire Trust Company case* is clearly distinguishable on the facts. There, the appointment of the receiver in the federal foreclosure suit was an incident of the lien created by the mortgage itself. From and after the date of the execution of that mortgage, the lien thereof given through contract by the debtor carried with it the right to the appointment of a receiver. Therefore the right of the bond-

holders to the appointment of a receiver under the mortgage antedated by many years the rights of the stockholders asserted by their bill in the state court.

Under *Pusey & Jones Co. v. Hanssen*, 261 U. S. 491, a simple contract creditor, as such, has no greater right to the appointment of a receiver than has a stockholder, nor can a statute giving such creditor that right bind the corporation or any other party in any court other than in the courts of the state of its creation (where its charter may
27 constitute an agreement therefor by reason of special constitutional or statutory provision). The creditor only acquires the right to a receiver under a conservation bill when, as and only if, the debtor consents thereto subsequently to the creation of his debt. (*Metropolitan Receivership*, 208 U. S. 90.)

If the remedy of appointment of a receiver is therefore given to the creditor in the federal court after the filing of the bill in the state court and after the incidental arrest of property thereby acquired by the state court the creditor's rights must yield to the state jurisdiction.

The misconception of the *Empire Trust Co. case*, arises in the opinion in the case at bar from the fact that it overlooks the following fundamental characteristics of the lien asserted in the federal bill filed in the *Empire Trust Co. case*:

1. A lien created by mortgage removes by agreement of the mortgagor the property of the mortgagor from process to perfect or foreclose liens junior thereto excepting as the same is made subject to and junior to the prior right of possession theretofore given in favor of the owner of such mortgage.

2. Stockholders' suits or conservation proceedings at the instance of general creditors or even bills for preservation of liens by junior lien holders or judgment creditors are all subject to and must yield to the senior and paramount rights of a first mortgage, theretofore given by the mortgagor. In other words, the rights of a bondholder to possession under a first mortgage are superior to the rights of stockholders, simple contract creditors or junior lienholders even if both sets of parties appear in the same suit.

3. From the time of the execution of a mortgage there is a potential arrest of the property of the corporation in favor of the mortgagee. The stockholder whose corpo-
28 ration has consented to the execution of the mortgage necessarily must enforce his rights junior to those given by the mortgage. Simple contract creditors and junior lien-

holders of the corporation are bound by the act of the mortgagor and are likewise junior to and subject to the primary rights under the mortgage arising out of the potential arrest of property given simultaneously with the execution of the mortgage.

So that when the stockholders in the *Empire Trust Co. case* filed their bill in the state court of Texas they were asserting rights junior to and arising after the arrest of property had already been made by the execution of the mortgage (which was the subject matter of the foreclosure proceeding in the federal court), in favor of the party in the federal court.

With this analysis of the *Empire Trust Co. case* it is clear that it comes within the exceptions of the general rule and not within the general rule itself.

(b) Palmer v. Texas, 212 U. S. 118.

Palmer v. *Texas*, 212 U. S. 118, cited in the opinion herein, is the third of a group of three cases involving the Waters-Pierce Oil Co. litigation, all appearing in the same volume of reports. The history of that litigation briefly stated is as follows:*

Palmer v. *Texas*, 212 U. S. 118 (the case cited in the opinion) is a bill in the federal court by a stockholder of the Waters-Pierce Oil Co. to distribute the assets of the corporation. The state proceeding, *Waters-Pierce Oil Co.* v. 29 *Texas* (No. 1), 212 U. S. 86, was instituted by the State of Texas to forfeit the permit of the Oil Co. (as a Missouri corporation) to do business in Texas and for the recovery of statutory penalties. The Texas court entered judgment covering the penalties for $1,623,500, and ordered a cancellation of the company's permit to do business in Texas, except as to its business interstate commerce. This relief having been obtained by the State, case No. 1 is thus disposed of (for our purposes).

On the same day that the State of Texas recovered this judgment in case No. 1, it filed a creditors' bill reciting the judgment procured in *Waters-Pierce Oil Co.* v. *Texas* (No. 1) and prayed for the appointment of a receiver in aid of the

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* All three of the cases were decided on the same day January 18, 1909. Case No. 3 (*Palmer* v. *Texas*) was argued on April 8 and 9, 1908, (212 U. S. 118) and cases (1) and (2) were argued apparently as one on November 2 and 3, 1908 (212 U. S. 86, 112).

satisfaction of the judgment. This creditors' bill is *Waters-Pierce Oil Co.* v. *Texas* (No. 2), 212 U. S. 112.

Case No. 2 is therefor an ordinary creditors' bill by the state as a creditor, just as is the bill in the federal court in the case at bar.

So that, what the Court says in *Palmer* v. *Texas* (case No. 3, being the case cited in the opinion at bar), as to the proceedings in the state court relative to the appointment of a receiver and the arrest of property must be taken as referring to the proceedings in *Waters-Pierce Oil Co.* v. *Texas* (No. 2) at page 112 of the same volume.

It thus becomes apparent that case No. 3 (*Palmer* v. *Texas* cited in the instant opinion) concerns itself with a situation wherein a stockholders' bill is brought in the federal court to distribute its assets after a creditor's bill (not having for its purpose any dissolution of the corporation or distribution of its assets) brought solely for the purpose of enforcing an obligation to a creditor had first been commenced in the state court.

Case No. 3 (*Palmer* v. *Texas* cited in the instant opinion) must therefore be authority for the proposition that even though the subject matter of the two suits was different (just as this Court finds the situation in the present case) the following is nevertheless the true rule of law: That the state court having first acquired jurisdiction over the subject matter of its own suit by the filing of the bill which involved possession of the property, thereby acquired control of the property from the date of the filing thereof, service of process or its equivalent, so as to exclude the interference through actual seizure by the federal court, under the federal court bill subsequently to and involving a different subject matter than the bill in the state court.

So different was the subject matter and parties in case No. 3 (*Palmer* v. *Texas*) that obviously a stockholder could not bring a suit to enforce a credit obligation, nor, on the other hand, could the creditor have brought the suit to distribute assets brought by the stockholders (without consent of the debtor which does not appear of record). It is therefore conclusive from the decision in *Palmer* v. *Texas* that the mere fact that either party could not have brought the kind of a suit the other brought is not material to the determination of the issue of the prior right to the possession of the property.

We conclude, therefore, that that part of the opinion in the instant case, which finds the essential difference in the

two suits to be the fact that the stockholder could not have brought a suit such as the creditor did in the federal court, is contrary to the express ruling of the Supreme Court of the United States.

(c) Wabash Railroad v. Adalbert College, 208 U. S. 38.

The essential feature of that case was that no objection was made and action in fact was voluntarily deferred by those claiming under the state court proceeding (first
31 commenced) to the taking of possession by and sales made by the federal court under a foreclosure suit later commenced in the federal court, all of which facts were known to the parties in the state court proceeding. At page 55, this clearly appears:

> "The state courts in the case at bar, in deference, it is said by counsel, to these well established principles, *deferred action until after* the property had been conveyed to the purchasers under the decree (federal) of foreclosure and the receiver discharged. Upon the termination of the receivership, it is urged, the exclusive jurisdiction of the circuit court ended, and the right of the state court to resume its normal jurisdiction revived."

So that the point decided in that case is that the federal court, having acquired jurisdiction by and with consent of the parties to the state court proceeding retained jurisdiction of the *res* by reason of the reservation in its decree as against the state court even though the suit had first been brought in the state court. Therefore *Wabash Railroad Co.* v. *Adalbert College* is a case where one of the courts was without potential power or control over property because the parties had voluntarily given up such control to the other court.

(d) Farmers' Loan & Trust Co. v. Lake Street Elevated R. Co. 177 U. S. 51.

In this case a bill was filed by the trustee in the circuit court of the United States for the Northern District of Illinois to foreclose a mortgage. On the same day, shortly after the federal bill was filed and process issued, the railroad company filed in the Superior Court of Cook County, Illinois, a bill against the same trustee for its removal as trustee under the mortgage involved in the foreclosure proceeding in the federal court.

The Supreme Court held that as the mortgagor had executed the mortgage it thereby consented to an arrest of its property in favor of the mortgagee, and, therefore, when
32 the mortgagee filed a bill to enforce such arrest of property the mortgagor could not defeat the mortgagee's right by any action later taken by it (the mortgagor) in the state court.

(e) Pacific Live Stock Co. v. Oregon Water Board, 241 U. S. 440.

This is an appeal from a decree of the District Court of the United States for the District of Oregon to review a decree dismissing a bill brought by the company against Lewis and others constituting the State Water Board of the State of Oregon to enjoin a proceeding before that board looking to the ascertainment and adjudication of the relative rights of the various claimants to the waters of the Silvies River in that state.

This case is not in point because there was not present any dispute between the courts as to the control or possession of the same specific property; the question was solely the right of one court to enjoin proceedings pending in another court.

Obviously where possession of property is not involved and the proceedings are, therefore, merely in personam, the one proceeding can not be enjoined in the other and the one can not be plead in abatement to the other but each case must be left to proceed to judgment. (*Kline* v. *Burke Construction Co.*, 260 U. S. 222, 230.) The case, therefore, is not in point.

(f) Moran v. Sturges, 154 U. S. 283.

This case is a striking illustration of where the Courts are not Courts of co-ordinate jurisdiction, because one court
33 is exercising a distinctly exclusive and therefore supreme jurisdiction in its particular field.

See also *Shields* v. *Coleman*, 157 U. S. 169, 177.

Recapitulation.

It is therefore conclusive that the rule of law settled by the Supreme Court of the United States, is that even though the subject matter of the suits may be different, nevertheless, if both suits involved the question of possession of the same property and if as between the two Courts neither has exclusive right to such possession prior to the commencement of the suit either because of statute (as in admiralty or bankruptcy) or because of action by the owner of the property himself (as in the case of mortgage) then the first court whose jurisdiction is invoked and to whom request is first made to seize the property acquires thereby power over the *res* which prevails over actual seizure by another court (having no superior right by statute or act of the parties) whose jurisdiction is invoked and to whom request is made to seize the property subsequently to the filing of the first suit and request made thereunder in the other court.

Applying this principle of law to the case at bar

(*a*) Both suits involved the taking of possession of the same property;

(*b*) Neither Court had a superior right of jurisdiction by statute or action of the owner of the property prior to the commencement of the suits;

(*c*) The commencement of the suit, in the state court, motion for the appointment of the receiver, the appearance and the action of the defendant in placing its property under the power of the state court preceded the filing of the bill in the Federal court;

34 (*d*) Therefore the Federal court under the later bill could not interfere with the power of the state court to take possession previously acquired by said state court.

II.

The finding of the opinion that the two suits were different in material respects, for the purposes of the determination of the issues presented in this cause is contrary to the ruling of the Circuit Court of Appeals for the Third Circuit in Ward v. Foulkrod, 264 Fed. 627. In that case a conservation bill in a federal court and a stockholders' bill in a state court were held to present the same controversy for the purposes of decision on the right of one court to take possession of property without interference through actual seizure by another court in a suit commenced after the filing of the suit in the first court. The subject matter of both suits for that issue was held to be possession of the corporation's property.

Says the opinion in the case at bar (p. 3):

> "The suit instituted by the stockholder in the State Court was different from that brought by a creditor in the Federal Court. *Moran* v. *Sturges*, *supra*, and *Empire Trust Co.* v. *Brooks*, *supra*."

As already demonstrated the difference in *Moran* v. *Sturges* was not in the nature of the suit but in the power (exclusively statutory) of the court to take possession of the property.

The difference in the *Empire Trust Company* case consisted not in different remedies sought by persons having equal substantive rights to the property but consisted in the enforcement of different substantive rights, one of which was superior to the other.

The *Empire Trust Co. case* is cited by the Circuit Court of Appeals for the Third Circuit in *Ward* v. *Foulkrod*, 264 Fed. 627, and the distinctiveness of its facts recognized. With the *Empire Trust Co. case* before it, the court nevertheless decided that a bill by a creditor for conservation in the federal court presents the same identical question as to *possession of property* as a stockholder's bill in the state court, **as the object and purpose of both is the conservation and possession of the property of the corporation**—and that the suit first started must prevail.

In the *Ward case* receivers were appointed in the state court of Delaware in February, 1919, on a *statutory* stock-

holders' bill filed in August, 1918, alleging inability of the corporation to meet its obligations then maturing. In January, 1919, a month before the appointment of the state receivers, the federal district court for the Eastern District of Pennsylvania on the application of a creditor appointed receivers to take possession of the property "within the jurisdiction of this court" under an ordinary creditors' bill, *not statutory*, but which alleged that the corporation was unable to provide for its obligations then maturing and showing generally a receivership to conserve its assets. During March, 1919, after the state receivers qualified in Delaware, they filed a petition in the federal court in Pennsylvania for the annulment of the order appointing the federal receivers and for the direction to turn over the property in their hands to the state receivers.

The Court of Appeals, after an examination of the authorities as to concurrent jurisdiction and the doctrine of arrest of property, sustains the jurisdiction of the state court, even though the appointment of federal receivers and federal possession of the property preceded the appointment of state receivers.

36 In that respect therefore that case is persuasive in the case at bar to give the property to the state court. So illuminating is the reasoning of the learned Circuit Judge Wooley, in the *Ward case, supra*, and so decisive is it of the present case, that we believe the Court's convenience will be best subserved by appending, at this juncture the following lengthy excerpt from the opinion.

"From this recital it is clear that there is not that difference in the actions pending in the two courts—if the jurisdiction thereof be considered as concurrent—which, under the decisions, raises a valid conflict of jurisdiction and confers priority of jurisdiction on that court which has first seized the property, entitling it to the retention thereof until the conclusion of the litigation. *In these actions, the parties are the same in the sense that each has asked for and had been granted the same relief concerning the same subject matter. The subject matter is precisely the same, being assets and property of the same corporation. The ground of action, namely, the corporation's inability presently to pay its debts, is the same; and the legal effect of that condition on its solvency, however, differently it may have been regarded at the commencement*

of the two suits, is now the same, being established by the decree of the Supreme Court of the State of Delaware, which is binding alike upon the courts of that State and of the United States under the full faith and credit provision of the Federal Constitution. A judgment of a state court, embracing findings of fact and construing a statute of its own state, is conclusive upon federal courts. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 87, 29 Sup. Ct. 220, 53 L. Ed. 417; *McKinney* v. *Landon*, 209 Fed. 300, 126 C. C. A. 226; *Palmer* v. *Texas*, 212, U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435. The only difference we see in the two actions are in the periods of the inception and duration and in the measure of the relief permissible. The appointment of receivers by the Delaware Court was made in an action there first brought to administer the estate and continue the business of the corporation for a period of indefinite duration determinable later by the Chancellor according as the corporation arises or fails to arise from its condition of insolvency. The appointment of the receiver by the federal court was made in an action which was later brought to administer the estate and continue the business of the corporation to meet a present emergency and to be continued, by express provision of the bill, only 'temporarily.' *The relief actually granted in both actions was the conservation of corporate property.* The action in the Federal Court was limited to relief of this character, as manifestly it must have been, for it is elementary that the state which creates a corporation alone has the power to wind up its affairs and dissolve it. *Parks* v. *U. S. Baskers' Corp.* (C. C.) 140 Fed. 160; *Maguire* v. *Mortgage Co.*, 203 Fed. 858, 122 C. C. A. 83. The action in the state court, while it included the relief of conservation of the corporation's property (beyond which it has not yet progressed), was not limited to relief of that character. It extended over the corporation, as long as its insolvency persisted, to the full measure of the jurisdiction conferred upon the Court of Chancery by the State of Delaware over insolvent corporations of its own creation.

It appears to us, therefore, that the actions in the two courts are such as clearly come within the rule that the court in which the first was brought acquired jurisdiction over its subject matter, though possession of its subject matter was first acquired through judicial seizure

> by the other court in an action subsequently brought, and that the District Court, on being apprised of the prior jurisdiction in the State court, would on appropriate proceedings, recognize its infringement of that jurisdiction and surrender its own."

Upon the reasoning of *Ward* v. *Foulkrod*,* *supra*, it is clear that in the case at bar although the parties are different and though the proceedings may arise from two separate sources of power, one statutory and one common law, nevertheless there is no difference in the one issue that is essential in the determination of the present case: The temporary control of the property of the corporation under the order of court pending its return to those legally selected to take permanent charge of the assets of the corporation. That the parties to the federal court suit, in the case at bar, intended conservation of assets as the sole purpose of the federal suit is evident from the record in this case. (See footnote, p 7, *ante*.)

Wherefore the decision should have been decided in favor of the state court proceeding.

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* It is true that the Court of Appeals in that case concluded further that as the application of the state receivers was for the annulment of the order appointing the federal receivers, who, because of the territorial situation (not being in the district where the state of creation of the corporation is located) could be but ancillary, the application by the state receivers was too broad: such application by the state court receivers should have prayed for the discharge of the federal receivers after the federal court had passed upon their accounts and for the appointment of ancillary receivers. Solely because of this procedural error in asking for too broad relief, the Court of Appeals affirmed the judgment of the District Court without prejudice to the rights of the state receivers. Indeed the Court of Appeals observes (p. 637):

> "If such an application had been made in this case, we apprehend the District Court would have recognized and have acted upon the rules we have discussed. But as the application that was made was not one to which the District Court was required to respond by yielding its jurisdiction in the manner demanded, we find that its action was without error, and that its decree should be affirmed. In order, however, that there shall be no misunderstanding as to what we consider to be the rights of the receivers of the State court in future appropriate proceedings looking to the appointment of ancillary receivers in jurisdictions foreign to that of their appointment, we direct the order appealed from be modified so as to provide that the dismissal of the petition shall be without prejudice to the rights of the Delaware receivers to institute appropriate proceedings for the appointment of ancillary receivers for the property of the corporation now in the hands of the receiver appointed by the District Court of the United States for the Eastern District of Pennsylvania."

III.

The opinion in holding that the doctrine of arrest of property does not apply unless the cases in both courts are the same is contrary to a three-judge opinion, as far back as 1875, of what is now the seventh circuit.

39 An old Indiana statute (Act of June 16, 1852) provided that whenever a judgment was recovered against a corporation, other than a bank, and it remained unpaid for a year, and execution was not stayed by appeal or supersedeas, the proper court had power to declare the charter of the corporation forfeited and to appoint a receiver to wind up its affairs.

In *Gaylord* v. *Ft. Wayne, M. C. R. Co.*, 10 Fed. Cas. No. 5284, a bill was brought in the Circuit Court of the United States for the District of Indiana in 1874 by the plaintiffs was had recovered a judgment (in the same court) against the railroad company in January, 1873, the same remaining unpaid for more than a year. The bil lasked for the forfeiture of the franchise of the corporation and also for the appointment of a receiver to wind up its affairs. A receiver was not appointed by the federal court until January 2, 1875.

It later developed that after the institution of the federal proceeding a suit had been brought in the Wayne Circuit Court of Indiana by other plaintiffs in which a receiver was appointed who had taken partial possession before the appointment of the federal receiver. Although the facts are not clear it does appear that the state bill was not for the same purpose as the federal bill. Necessarily, therefore, the two cases were different. But Circuit Judge Drummond (who sat with Hopkins and Blodget, District Judges) in an able opinion, wherein the application of the state receiver to rescind the order appointing the federal receiver is denied, says, at page 122:

> "The principle upon this subject is properly stated in the opinion of the circuit court of the Northern district of Illinois in the case of *Union Trust Co.* v. *Rockford, R. I. & St. L. R. Co.* [Case No. 14,401], that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take the possession or control of the *res*, the subject matter of the controversy, to the exclusion of all

interference from other courts of concurrent jurisdiction, and that the proper appication of this principle *does not require that the court which first takes jurisdiction of the controversy shall also first take the actual possession of the thing in controversy.*"

To the same effect is the decision of the Circuit Court of Appeals for the Seventh Circuit in *McDowell* v. *McCormick*, 121 Fed. 61, although in the latter case they were suits by different judgment creditors to enforce separate rights. Neither bill was a class bill, but the right to take possession of the same property was involved in both bills.

Wherefore we conclude that the opinion in the instant case which requires similarity of suits as a condition precedent to the enforcement of the doctrine of arrest of property is contrary to the settled courts of decision in this circuit.

IV.

The opinion in finding that the bringing of the suit in the federal court was not collusive and in violation of Section
41 **37 of the Judicial Code overlooks the fact that the stockholders' suit in the state court was a derivative proceeding wherein the corporation is considered the real party plaintiff and that the federal jurisdiction was acquired by the "consent" and action of the same party, to wit: the debtor corporation.**

The class bill of the stockholder brought in the state court was a derivative proceeding. The right to bring an action against officers and directors for malfeasance, nonfeasance and/or misfeasance is in the corporation itself. So likewise is the right to have the property of the corporation administered by its officers without waste or dissipation, in the corporation itself. It is only where the corporation refuses or where the circumstances show that a demand would be futile that a stockholder is given the right to invoke the aid of a court of equity to compel the corporation to carry out its duty and to enforce such right for himself and others similarly situated by joining the corporation as a party defendant with the offending directors and officers. Upon this the books are full of cases.

6 Fletcher Cyc. Corp., p. 6864:

> "The action is derivative, *i. e.*, in the corporate right, if the gravamen of the complaint is of injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders or seeks to recover assets for it or prevent dissipation of them."

The corporation was served in the state court and appeared. The corporation was then in court *formally as a defendant*, but *actually as a plaintiff* in a case involving the possession of property.

More than that, the corporation appeared in the state court for the very purpose of preventing the state court from immediately taking possession of the property upon the promise that it (the corporation) would take no action and that

"the rights of the complainant under this bill will not be
42 affected in any way at all by allowing this matter to go over for a week or ten days." (Rec. 56.)

Therefore the corporation as the owner of the property not only appeared in the state court to recognize the power of the state court over the *res* but actually promised the court that it would not interfere with such right. Such appearance and promise certainly divest the corporation of any power to later give to others (who theretofore had no superior rights to the property) any power to possession of the property as against the state court through the invocation of the federal court process for such purpose.

At the very moment when the motion for the appointment of a receiver was filed (which necessarily involved potential power over the property of the corporation) and the corporation appeared and recognized the existence of this motion and of that potential power and asked the Court to delay the execution or transformation of this potential power into actual seizure of its property, the corporation thereby divested itself of its own power to give or "consent" to any other stockholder or creditor acquiring any potential power to or actual possession of its property through the aid of federal court process.

With its property so under arrest by the state court, the corporate debtor (formal defendant though actual plaintiff in the state court) procured a creditor, the United States
43 Worsted Mills Sales Co. to do—what? To avoid the arrest of its (the debtor's) property by the state court and to submit to an arrest of its property by the federal court

in violation of its own action in consenting to the arrest of its property by the state court. (See footnote, p. 7, *ante*.) And the United States Worsted Mills Sales Co. proceeds to bring about the change of custody.

The basis of a conservation proceeding in the federal court such as is described in *In re* Metropolitan Receivership, is a bill by a creditor possessing the requisite diversity of citizenship and a *due* debt for the jurisdictional amount. The consent of the debtor is thereby a recognition of this right in the creditor and acts as a waiver of defects which are not vital for federal jurisdiction but are necessary for equity jurisdiction. It is the creditor who invokes federal jurisdiction.

Without a debt that is due, without any demand upon the debtor, or at least a showing that a demand would have been of no avail, without any bona fide controversy between creditor and debtor, the mere arrangement between the two to use the fact that one of the parties is a creditor in order to permit the debtor to invoke the federal jurisdiction for a purpose other than the collection of the debt, is the selection by the debtor of a "haven in case of a storm" and is plainly collusive. That is the situation in the case at bar.

There is not a scintilla of evidence in this record that the debt was due. The pleadings show that the creditor treated the debt as not yet due. The record is conclusive that the creditor, its attorneys and its authorized agents, who signed the bill in its behalf, knew of the debtor's situation in the state court. (See footnote, p. 5, *ante*.) So the record is also clear that the debtor sought the creditor and that the creditor through its authorized agent knew at the date when
44 it was solicited by the debtor that the purpose of the federal suit was to be conservation of assets for both stockholders and creditors *and not for the payment of the creditors' claim.* (See footnote, p. 7, *ante*.) The creditor knew that there was enough cash on hand to pay the creditor the full amount of its claim if due and that its claim, together with the claims of all other general creditors, was less than fifteen per cent of the assets of the corporation. (See Rec. 2 to 6.)

If its property was already under arrest in the state court, how could the corporate debtor "consent" to the subsequent arrest of its property in the federal court and thereby give the federal court jurisdiction of the controversy as to the property?

The arrest of the property by the state court consisted of the institution of suit, the appearance of the defendant, and the application for appointment of a receiver, and the continuance, of all of which the plaintiff in the federal court admittedly was advised (Rec. 112) and all of which facts were before the federal court when it appointed the feedral receiver. The Court, in basing its opinion upon the finding of fact that neither creditor nor federal court had knowledge of these facts, wholly overlooks the record.

As well pointed out in *Patterson* v. *Veasey*, 295 Fed. 163, the arrest of property is governed by the same principles as the arrest of the person. District Judge Sibley, in the course of the most exhaustive review of the decisions on concurrent jurisdiction to be found in the books, at page 165, says:

> "As to criminal cases it is settled that jurisdiction for the purposes of the rule attaches not on indictment but on arrest of the person. *In re* Johnson, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103; *Ponzi* v. *Fessenden*, 258
> 45 U. S. 254, 42 Sup. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879. *Arrest in criminal cases corresponds to service in civil cases, whether by personal notice or by seizure of some res.* Cases strictly in *rem*, in which jurisdiction arises in the court to act at all only on seizure or attachment of the *res*, may be laid to one side. So may those involving levy of general final process in the former, plainly 'jurisdiction attaches' only on seizure; in the latter, the court has no specific property to deal with until the officer selects and levies upon it. The language used in all such cases, of course, is of actual seizure as determining. In case of receivership, however, actual seizure is an impractical test, for it might easily happen that each receiver gets first actual possession of a part of the property; whereas, control of the whole is necessary for each court to exercise its jurisdiction in the premises. We find it accordingly ruled in many cases that the prior appointment of a receiver will take precedence, though there be no actual possession taken. It is enough to cite as controlling in each of the courts here involved: *Palmer* v. *Texas*, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435; *Inter-Southern Life Ins. Co.* v. *McQuarie*, 148 Ga. 233, 96 S. E. 424. *But the cases where prior appointment concurred with prior filing and service are not authorities to the effect that 'jurisdiction attaches' only by appointing a receiver. Plainly such a rule might tend to hasty and improvident action and appointments, to appoint-*

ments without hearing; might also lose to diligent creditors a choice of forum important to them, as in the case of a citizen of another state in his choice of a federal forum, and would put it in the power of a defendant by resisting one application and favoring another, to determine the priority of courts. The true rule is that the filing of the bill praying for a receiver, the sanction of it by the judge, and service in accordance with his order, perfects jurisdiction—'jurisdiction attaches' over the question of the receivership. **The appointment of the receiver does not create the jurisdiction but is the result of it. The right to take possession of the property comes from the original jurisdiction to make the appoint-**
46 **ment, and not from the appointment, itself. The receivership is the assertion of the jurisdiction that has already attached and a means of exercising it. It may attach and be granted tentatively before service, as in a temporary receivership granted without notice and even before the bill is filed, in Georgia, and is to be respected."**

When therefore in the case at bar there was this arrest in the state court, the federal court could not acquire any right by seizure given to it thereafter (*Palmer* v. *Texas*, *supra*.)

When the debtor *procures* the creditor and both have knowledge of the arrest of the state court and both join in a suit in the federal court; and when such federal suit is intended for the sole purpose of disturbing the arrest made by the state court; and when said federal suit gives jurisdiction to the federal court solely by the act of the debtor; then under such circumstances, we submit, if the act of the debtor which creates the federal jurisdiction (and which is accepted by the creditor with full knowledge) is in fraud of the state court and is intended to defeat the state court jurisdiction such act of the debtor and knowledge of the creditor taints the federal proceedings and results in a collusively acquired jurisdiction in violation of Section 37 of the Judicial Code.

V.

The opinion, in finding that "There is no question but that both the complainant and defendant construed the word "indebted" to mean "presently indebted" misapprehends the record. The pleader itself (complainant) as shown by the context of the bill construed it otherwise than as found in the opinion. The court erroneously attributed weight to the fact that the defendant did not question the nature of the debt—thereby using presumption contrary to all rules for testing federal jurisdiction.

At page 4 of the opinion is the recital:

> "After a careful examination of the evidence, we conclude there is sufficient proof to support the court's jurisdiction."

On pages 86, 105 and 106 of the record there are references to the "claim" of the plaintiff in the federal court. But we have not been able to find a scintilla of evidence showing that the debt was *due*.

Courts should not look to reported cases or dictionaries for the meaning of words used in a pleading where the pleader by his own context shows clearly the meaning intended by him. Now what does the bill show?

Paragraph 8 (Rec. 4):

> "* * * and pay all of its *maturing debts* * * * now unable to meet its *maturing obligations* * * * the principal of said mortgage for $287,500 covering the Chicago plant of the defendant, and $9,000 interest thereon, *became due* upon the first day of February, 1925 * * * that defendant owes the People's Savings Bank of Moline, Illinois, the sum of $1000 upon the company's promissory note, *which matured* January 30, 1925 * * * that there are outstanding other promissory notes of the de-
48 fendant, aggregating $100,000.00, $75,000.00 of *which have matured.*" * * *

Paragraph 9 (Rec. 5):

> "That the defendant *owes* approximately $4500 to the United States Government on its capital stock tax for the year 1924, which tax *was due and payable* in September, 1924."

In view of this situation,—there being no evidence to contradict the pleader's own construction of the word "indebted,"—there is no ground for the application of the federal "Amendment Act," Section 954 R. S.

The *Wisconsin case* cited in the opinion (*Troubridge* v. *Sickler*, 42 Wis. 417) to define the word "indebted" has no application because in that case the Court had jurisdiction of the cause even though the debt was not due. The maturity of the debt was only important in the determination whether the plaintiff was then entitled to procure the exercise by the Court of its admitted jurisdiction.

In the case at bar the word "indebted" goes to the jurisdiction of the Court *as a federal court*. It is elementary that:

> "There are no presumptions in favor of the jurisdiction of the courts of the United States, and the facts upon which it rests must, in some form, appear in the record of all suits prosecuted before them. *Indeed the presumption in every stage of the cause in the United States courts is that the court is without jurisdiction unless the contrary affirmatively appears from the record.*" (7 Ency. U. S. Sup. Ct. Rep. 745, "Jurisdiction") and cases cited.

It is made clear in *In re* Metropolitan Railway Receivership, 208 U. S. 90, 107, that the debt must be *due*. Says Mr. Justice Peckham (107):

> "In the bill filed there was the allegation that a demand of payment of a debt *due* each of complainants had been made and refused.
>
> The legal significance of this requirement is that the
49 creditor must have at the date of the commencement of his suit at least the right to go into some Federal Court (law or equity).

The plaintiff's bill in the case at bar seeks to invoke federal jurisdiction. He must affirmatively show that jurisdiction, *as all presumptions are against it*. He must show a bona fide controversy. He must show that the debt sued on is due.

In the face of the rigid requirements in the allegation of federal jurisdiction, this opinion, contrary to all authority, supplies presumptions to aid an otherwise non-existing federal jurisdiction.

The court further finds, in its opinion, (p. 4) that "other interested parties intervened and became parties plaintiff." This finding of fact overlooks the record which shows:

(*a*) That the federal bill of complaint was filed February 19, 1925 (Rec. 2, 10);

(*b*) The order appointing the federal receiver on the federal bill was entered February 19, 1925 (Rec. 14);

(*c*) The motion and petition of the state court receiver contesting the jurisdiction of the federal court receiver was filed in the federal court March 13, 1925 (Rec. 22);

(*d*) The order of the federal court providing for the mailing of notices to creditors by the federal receiver and providing for the filing of claims by creditors was entered March 17, 1925—*four days after the jurisdiction of the federal* court was attacked (Rec. 23);

(*e*) Creditors' claims were all filed pursuant to the order of March 17, 1925 (Rec. 143);

(*f*) Intervening petition of stockholders filed in the federal court April 28, 1925 (Rec. 40);

(*g*) Order permitting filing of intervering petition of stockholders entered May 21, 1925 (Rec. 46).

Apart from these items of the record, we have not found a scintilla of evidence showing any other intervening parties. Wherefore, the opinion in giving weight, in aid of creating federal jurisdiction, to the fact that creditors and stockholders have intervened subsequent to the date when the federal receiver was appointed and subsequent to the date when such receiver was attacked by the state receiver, is clearly contrary to the express ruling and decision of the Supreme Court of the United States in *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 501.

It proceeds in a circle by permitting parties who have no right to federal jurisdiction to invoke federal jurisdiction for the purpose of procuring other persons to create jurisdiction and then to use such later acquired federal jurisdiction to sustain the original lack of federal jurisdiction in the appointment of the receiver.

If the appointment of the receiver is to be sustained as of the date of the intervening petitions then clearly the state court receiver must prevail (*Pusey & Jones* v. *Hanssen*, *supra*.)

At page 4 of the opinion the court finds:

> "The testimony leaves no doubt as to the past due character of the account."

We deferentially submit that there is not an iota of testimony in the entire record relative to the nature of the claim and that the only reference made to the claim by the parties to the federal court proceeding appears in the pleadings themselves as already demonstrated.

But the opinion properly finds that the question of want of jurisdiction may be raised for the first time in the reviewing court.

The opinion finds (p. 4) that

"The fact that appellants' counsel did not raise this
51 question until they reached this court, and then only in their reply brief, indicates that they as well as the District Court and the parties, construed the word 'indebted' to mean a debt presently payable."

To attach any significance to the fact of the failure of the appellants to raise the question of the maturity of the debt as bearing upon the jurisdiction of the federal court as a federal court is clearly inconsistent with its own opinion that a want of federal jurisdiction may be raised for the first time in the reviewing court.

This inconsistency with its own opinion is also inconsistent with the settled rule of the Supreme Court established in *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, in which the court ruled.

(*a*) The want of federal jurisdiction will be considered for the first time even in the Supreme Court whether the question be raised there by either party or by the court itself;

(*b*) That the question of want of jurisdiction will be tested on the face of the record;

(*c*) That the consent of both parties to the litigation can not have any effect in aiding an otherwise non-existent federal jurisdiction;

(*d*) That the fact that both parties assumed the existence of federal jurisdiction and litigated the issues on merits and appealed on the merits did not foreclose an original investigation of the question of existence of federal jurisdiction.

For the reasons assigned a reconsideration of this
52 cause should be had and a rehearing therein allowed.

Respectfully submitted,

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ALBERT M. BLUM,
JOHN V. DELANEY,
Attorneys for Appellants.

LLOYD C. WHITMAN,
Of Counsel.

And afterwards, to wit: On the fourth day of June,
53 1926, the following further proceedings were had and entered of record, to wit:

Friday, June 4, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, *Circuit Judge*, presiding
Hon. Evan A. Evans, *Circuit Judge*
Hon. George T. Page, *Circuit Judge*
Hon. Albert B. Anderson, *Circuit Judge*
Edward M. Holloway, *Clerk*
Palmer E. Anderson, *Marshal*

Before:

Hon. Samuel Alschuler, *Circuit Judge*
Hon. Evan A. Evans, *Circuit Judge*
Hon. George T. Page, *Circuit Judge*

Daniel V. Harkin, *et al.*,	Appeal from the District Court of the United States for the Northern District of Illinois; Eastern Division.
3642 vs.	
Edward J. Brundage, Receiver, *et al.*,	

It is ordered by the Court that the petition for a rehearing in this cause be, and the same is hereby denied.

UNITER STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from 1 to 53, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel and motions and orders relating to the filing of same)

In the Case of

Daniel V. Harkin and Union Bank of Chicago, Receivers, etc.,

vs.

Edward J. Brundage, Receiver, etc., *et al.*

No. 3642, October Term, 1925, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-first day of June, A. D. 1926.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1926

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U. S.
FILED
SEP 1 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

No. [redacted] 117

DANIEL V. HARKIN AND UNION BANK OF CHICAGO,
RECEIVERS, ETC.,
Petitioners,

vs.

EDWARD J. BRUNDAGE, ETC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

LLOYD C. WHITMAN,
BERNHARDT FRANK,
Counsel for Petitioners.

[redacted] & LOOMIS CO., LAW PRINTERS, CHICAGO

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A. The opinion of the Circuit Court of Appeals in the instant case holding that if the plaintiffs in the two suits are different and the subject matter of the two suits is such that neither party could have brought the same kind of suit brought by the other, the doctrine of arrest of property does not apply, is in direct conflict with the express holding of the Court in *Palmer* v. *Texas*, 212 U. S. 118 9

B. The rule in the instant case "that if the two suits were different, there was no conflict of jurisdiction, and the Court which first acquired jurisdiction over the res by actual seizure through its receiver should retain jurisdiction," is in conflict with the weight of authority, including every decision cited by the Court of Appeals for the Seventh Circuit in support of its erroneous conclusion 11

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(b) Palmer v. Texas, 212 U. S. 18 13

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(e) Pacific Live Stock Co. v. Oregon Water Board, 241 U. S. 440 1

(f) Moran v. Sturges, 154 U. S. 256 1

C. The decision herein is contrary to the holding of this Court in *Farmers' Loan & Trust Co.* v. *Lake Street Elevated Ry. Co.*, 171 U. S. 51. The Circuit Court of Appeals for the Seventh Circuit fails to give to the owner's pledge to the State court its legal effect as a deposit of the property with the State court and surrender by the owner to the State court of present control of the same 1

II. The decision herein (1926) conflicts with the prior decisions of the Courts of Appeal for the Third and Eighth Circuits. The Court of Appeals for the Seventh Circuit bases its decision upon the ruling, contrary to the prior rulings of the Third and Eighth Circuits, that in a conflict between a State and Federal court over possession of identical property, though the other necessary elements exist, the doctrine of arrest of property (constructive possession) is not applicable if (a) the formal parties plaintiff in the two suits are different, or (b) the suits are such that neither could have been brought by the complainant in the other 1

III. The error of the Court of Appeals for the Seventh Circuit in holding that the two suits were dissimilar in nature, misconceives the true nature of the two proceedings and adopts a theory thereof contrary to the decision of this Court in In Re

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IV. The Federal Court was without jurisdiction under Section 37 of the Judicial Code. Under the facts, the instant case does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, and the parties were improperly and collusively joined for the purpose of creating a case cognizable under the Code 22

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1926.

DANIEL V. HARKIN AND UNION BANK OF CHICAGO,
RECEIVERS, ETC.,

Petitioners,

vs.

EDWARD J. BRUNDAGE, ETC., ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, the Union Bank of Chicago, a corporation, and Daniel V. Harkin, State court receivers of the Daniel Boone Woolen Mills, Inc., an Illinois corporation, seek the review by this Honorable Court of an order of the United States Circuit Court of Appeals for the Seventh Circuit, entered April 14, 1926 (Rec. 175; rehearing denied June 4, 1926, Rec. 208), affirming an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered July 9, 1925 (Rec. 47), by which latter order the District Court overruled your petitioners', the State

court receivers', motion and petition of March 13, 1925 (R
16-22), for an order on the Federal court receiver, respo
ent Edward J. Brundage, to turn over to your petitioners,
State court receivers, property of the debtor corporation
the possession of Mr. Brundage as Federal court receiver

Saturday, February 14, 1925, a minority stockholder fi
a class bill ("in his own behalf and that of all other sto
holders and other persons interested," Rec. 49) against
debtor Illinois corporation, the Daniel Boone Woolen Mi
Inc., in the Superior Court of Cook County, Illinois (R
49-55), for the appointment of a receiver (Rec. 53, 54, 54-
to collect, conserve, and marshal assets, and meanwhile c
tinue the business of the debtor corporation (Rec. 53-5
for injunction against the defendant's officers, directo
agents, and attorneys, restraining them from conveyi
pledging, or hypothecating the assets of the company, or
any manner interfering with its business and affairs;
for general relief (Rec. 55). Broadly, the bill charges
appearance of millions of dollars of assets of the corpo
tion; that the affairs of the company are at or approach
a standstill and deadlock while present and former mana
ments engage, in the public press and elsewhere, in a c
paign of mutual vituperation destructive of the good w
and seriously threatening the solvency of the corporati
and that the present officers and directors refuse to t
action against former officers and directors who have i
gally diverted assets of the debtor corporation to their
use (Rec. 49-55).

Monday, February 16, 1925, pursuant to notice, the St
court complainant presented in the State court its mot
for the appointment of a receiver of the debtor corporat
(Rec. 55), the corporation, by its attorney, entered its
pearance (formally as defendant, but in legal effect as c
plainant, the suit being a derivative proceeding) and as
for a continuance, pledging the court and opposing cou

that "the rights of the complainant under this bill will not be affected in any way at all by allowing this matter to go over for a matter of a week or ten days" (Rec. 56), and that meanwhile the *status quo* would be preserved (Rec. 56-58). Thereupon, the State court formally entered complainant's motion and continued the same to Saturday, February 21, 1925 (Rec. 55).

Immediately on leaving the court room where he had procured the continuance, as aforesaid, the debtor corporation's attorney conferred with its president (Rec. 82), and that same afternoon, Monday, February 16, 1925, the debtor corporation, through its president, vice president, a third director, and the same attorney (the first three constituting the executive committee of the board of directors, Rec. 92), decided that a receivership of the debtor corporation was necessary but determined to procure the appointment of a receiver for the corporation by a Federal court instead of the State court (Rec. 103). Accordingly, through the same attorney, the corporation solicited an out-of-town attorney for non-resident stockholders to file suit in the Federal court (Rec. 103-104), but after consulting special counsel (Rec. 104-105), decided that instead of a stockholder's bill, a creditor's bill should be filed (Rec. 105). While the creditor's bill was in preparation at the office of this special counsel "though no party plaintiff had as yet been found" (Opinion, Rec. 173), the debtor corporation, through its attorney and its vice president, solicited the United States Worsted Sales Co. to let the debtor corporation "have his claim to turn over to" special counsel "for the protection of the company and creditors and stockholders * * *; for the purpose of having a receiver appointed in the Federal court" (Rec. 105-106), with the assurance, "somewhere along the road, that there would be no expense to his company involved" (Rec. 106).

Both the Federal court plaintiff (Rec. 55) and its attorney of record herein (Affidavit of said attorney, Rec. 112)

had actual knowledge of the pendency of the State co
case and of the fact of the appearance therein of the deb
corporation and the entry and continuance of the motion
appointment of a receiver to February 21, 1925. The cour
statement (Opinion, Rec. 171) that the plaintiff did not kn
of "the proceedings that occurred in the State court" nec
sarily, and as elsewhere in the opinion (Rec. 170-171), ref
only to the special stipulation, or pledge, by the debtor c
poration in the State court.

With actual knowledge, then, as aforesaid, the United Sta
Worsted Sales Co., on Thursday, February 19, 1925, filed
bill of complaint in the instant case (Rec. 2-9), the sa
special counsel and attorney for non-resident stockhold
acting, now, as solicitors of record herein for the plain
creditor (Rec. 9). That same day, without notice to the St
court complainant, upon voluntary appearance of the deb
corporation by the same attorney who appeared for it in
State court (Rec. 11, 55), and its confession of the bill
consent to receivership (Rec. 111), the parties secured
appointment by the Federal court of respondent Edw
J. Brundage as receiver of the debtor corporation (Rec.
14). Mr. Brundage forthwith qualified as such receiver (R
15) and took possession of the assets of the defendant deb
corporation (Rec. 139).

The Federal court bill (Rec. 2-9) charges substantially
same corporate abuses and deadlock in the defendant c
poration's affairs as does the State court bill, and, like
State court bill, is a class bill in that it prays that the ass
of the defendant corporation be declared a trust fund and
ministered "for the benefit of the plaintiff and the other cr
itors and stockholders of said defendant" (Rec. 8), and tha
receiver be appointed to operate the business of the defe
ant as a going concern to prevent injury "to the plain
and to the other creditors and the stockholders of the
fendant" (Rec. 7). It shows that the total debts of the
fendant are not over twenty per cent of its assets which

ceed its liabilities "by more than '$1,500,000.00,'" and that "said corporation is solvent" (Rec. 4).

The bill alleges that plaintiff's claim is $6,176.43 (Rec. 3), and that the defendant has approximately $6,000.00 cash on hand (Rec. 6), but neither alleges demand by plaintiff upon the defendant or that the plaintiff's claim is past or presently due. And, with all deference to the Circuit Court of Appeals (Opinion, Rec. 172), there is not a scintilla of evidence in this record as to whether, in fact, plaintiff's claim was actually due. The question turns on the face of the bill itself which alleges (Rec. 3) that "the defendant is indebted to the complainant" and speaks of "the claim of the complainant." But elsewhere in the bill (Rec. 4) the terms "indebted," "debt" and "claim," are used with reference to patently non-due obligations of the debtor company, and, without exception, whenever due items are referred to (Rec. 4-5), the fact that the items are due is expressly charged.

February 28, 1925 (Rec. 69-70), on the State court complainant's motion, entered, as aforesaid, February 18, 1925, and the intervening petition of another stockholder advising the State court of the appointment of a receiver by the Federal court and the action of the debtor corporation in procuring and consenting to that appointment, the State court appointed your petitioners, the Union Bank of Chicago and Daniel V. Harkin, receivers of the debtor corporation. The State court receivers qualified March 2, 1925 (Rec. 70).

March 13, 1925 (Rec. 16), your petitioners, the State court receivers, pursuant to orders of the State court (Rec. 69-70), filed their written motion and petition in the United States District Court for an order on the Federal court receiver to turn over the property of the debtor corporation to the State court receivers.

To and including this date, namely March 13, 1925, no creditor, stockholder or other person had intervened or become party to the Federal court proceeding (Rec. 23).

The Questions Presented.

As grounds for the issuance of the writ, your petitioner respectfully present:

I.

The decision herein is in conflict with the law established by this Court in *Palmer* v. *Texas*, 212 U. S. 118. The Court of Appeals for the Seventh Circuit bases its decision upon the erroneous ruling that in a clash between a State and Federal court over possession of identical property where the other necessary elements exist, the doctrine of arrest of property (constructive possession) is not applicable if (*a*) the formal parties plaintiff in the two suits are different, or (*b*) the suits are such that neither suit could have been brought by the plaintiff in the other.

II.

The decision herein (1926) similarly conflicts with the decisions of the Circuit Court of Appeals for the Third Circuit in *Ward* v. *Foulkrod* (1920), 264 Fed. 627, and *O'Neil* v. *Welch* (1917), 245 Fed. 261, reversing *Welch* v. *Union Casualty Co.* (1917), 238 Fed. 968, and the decisions of the Circuit Court of Appeals for the Eighth Circuit in *M'Kinney* v. *Landes* (1913), 209 Fed. 300, *Harner* v. *Hegnes* (1921), 269 Fed. 53 and *Berg* v. *Fidelity Casualty Co.* (1921), 274 Fed. 311.

III.

The decision herein is in conflict with this Court's decision in *In re Metropolitan Receivership*, 208 U. S. 90, and with prior decisions of the Court of Appeals for the Third Circuit and creates a diversity of decision between the Courts of A

peal for the Third and Seventh Circuits. The Court of Appeals for the Seventh Circuit, basing its decision herein upon the erroneous conclusion that the creditors' bill is so dissimilar in nature to the stockholder's class bill that the doctrine of arrest of property is inapplicable, misapprehends the real nature of the two suits as established by the foregoing decision of this Court.

IV.

The Federal court was without jurisdiction under Section 37 of the Judicial Code. The instant case does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, and the parties were improperly and collusively joined for the purpose of creating a case cognizable under the Code.

V.

Such resort as in the instant case to a Federal court to evade the jurisdiction of a State court, if sustained and maintained, will result in utter disregard of necessary mutual adjustments of power between these two independent judicial systems (*Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233).

Wherefore, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in this case, which was entitled in that Court as *United States Worsted Sales Company, a corporation, plaintiff* v. *Daniel Boone Woolen Mills, Inc., a corporation, defendant*, on appeal of Daniel V. Harkin and Union Bank of Chicago, Receiver, etc., appellants *vs.*

Edward J. Brundage, Receiver, etc., et al., appellees, to the end that said cause may be reviewed and determined by this Court as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem appropriate and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

Daniel V. Hoskins and
Union Bank of Chicago, Receivers, &c.,
Petitioners

By Lloyd C. Whitman
Counsel for Petitioners

Lloyd C. Whitman

Bernhardt Frank
Counsel for Petitioners.

STATE OF ILLINOIS, }
COUNTY OF COOK, } ss.

Lloyd C. Whitman, being first duly sworn deposes and says that he is one of the counsel for the petitioners herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes the same to be true; and that said petition is, in his opinion, well founded in law as well as in fact.

Lloyd C. Whitman

Subscribed and sworn to before me this 30th day of August, 1926.

Notary Public

BRIEF.

I.

A.

The opinion of the Circuit Court of Appeals in the instant case holding that if the plaintiffs in the two suits are different and the subject matter of the two suits is such that neither party could have brought the same kind of suit brought by the other, the doctrine of arrest of property does not apply, is in direct conflict with the express holding of this Court in Palmer v. Texas, 212 U. S. 118.

Palmer v. *Texas*, 212 U. S. 118, is the third of a group of three cases involving the Waters-Pierce Oil Co. Case No. 1 is *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, case No. 2 is *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112, and case No. 3 is *Palmer* v. *Texas*, 212 U. S. 118. Case No. 1 was instituted in the State court by the State of Texas to forfeit the permit of the Oil Company (a Missouri corporation) to do business in Texas, and to recover statutory penalties. The Texas State court cancelled the company's permit to do business in the state and entered judgment against it in favor of the State for $1,623,500. The same day that the State of Texas recovered this judgment in case No. 1, it instituted case No. 2 by filing its creditors' bill reciting the judgment in case No. 1 and praying for the appointment of a receiver in aid of satisfaction of that judgment. Case No. 2, in other words, was an ordinary creditors' bill by the State of Texas against the Oil Company. Thereafter, a stockholder of the Waters-Pierce Oil Co. instituted case No. 3 by filing suit in the Federal court for distribution of the assets of the de-

fendant corporation. After the State court, in case No. 2, had appointed a receiver of the Waters-Pierce Oil Co., but before the State court receiver had taken possession of the defendant company's assets, the Federal court, in case No. 3, appointed its receiver who seized the property of the defendant company in dispute. This court held in case No. 3 (*Palmer* v. *Texas*, 212 U. S. 118) that the property in dispute was in the constructive possession of the State court, and therefore sustained the right thereto of the State court receiver.

It is thus apparent that in case No. 3 (*Palmer* v. *Texas*, 212 U. S. 118), this Court applies the doctrine of arrest of property (constructive possession) as between a stockholder's bill for distribution of assets and, on the other hand, a creditors' bill not for distribution of assets but brought for the sole purpose of enforcing an obligation to the individual creditor complainant. The only identity of parties to the two involved suits was that the same corporate owner of the property was defendant in both. The only identity of subject matter of the two involved suits was that both suits sought control of the same property. Obviously, the Federal court stockholder plaintiff could not have brought suit to enforce the State court creditor complainant's credit obligation; nor, on the other hand, could the State court creditor complainant have brought the Federal court stockholder plaintiff's suit to distribute assets. *Palmer* v. *Texas*, 212 U. S. 118, therefore is conclusive that neither differences in the formal parties plaintiff, nor the fact that the one complainant could not institute or maintain the suit brought by the other complainant goes to the applicability of the doctrine of arrest (constructive possession) of property. The decision herein of the Circuit Court of Appeals for the Seventh Circuit based upon a contrary rule of law is in conflict with the law established by this Honorable Court in *Palmer* v. *Texas*.

B.

The rule in the instant case "that if the two suits were different, there was no conflict of jurisdiction, and the Court which first acquired jurisdiction over the res by actual seizure through its receiver should retain jurisdiction," is in conflict with the weight of authority, including every decision cited by the Court of Appeals for the Seventh Circuit in support of its erroneous conclusion.

By the weight of authority, the rule of the Court of Appeals for the Seventh Circuit above quoted is applicable only:

(*a*) When the court seizing the property (the second court) is exercising an exclusive jurisdiction conferred upon it by law,—as admiralty jurisdiction, or

(*b*) When the parties to the second suit are asserting a superior prior right of possession conferred upon them by the defendant owner before the first court's jurisdiction attached,—as by prior mortgage.

The affirmative principle which these cases establish is that (subject only to EXCEPTIONS (*a*) and (*b*), *supra*) in a conflict between two courts each having jurisdiction over its own subject matter and each requiring possession of the same property for the exercise of its jurisdiction, though the cases are different, the court whose potential power to arrest the property is first properly invoked, thereby acquires control of the property superior to, and to the exclusion of, subsequent actual seizure of the same property by the other court in the suit later stated.

With these principles in mind, we proceed to analyze the cases cited in the opinion herein.

(a) Empire Trust Co. v. Brooks, 232 Fed. 641.

The Federal court case was a bill to foreclose a mortgage, the State court case a bill by a stockholder, under a Texas statute, to wind up the mortgagor corporation. The decision itself, as distinguished from the court's reasoning, is an illustration of our Exception (*b*), *supra*. The appointment of the receiver in the Federal foreclosure suit was an incident of the lien created by the mortgage itself.

From the time of the execution of a mortgage there is a potential arrest of the property of the corporation in favor of the mortgagee. The stockholder whose corporation has consented to the execution of the mortgage necessarily must enforce his rights junior to those given by the mortgage. Simple contract creditors and junior lienholders of the corporation are bound by the act of the mortgagor and are likewise junior to and subject to the primary rights under the mortgage arising out of the potential arrest of property given simultaneously with the execution of the mortgage. So, when the stockholders in the *Empire Trust Co. case* filed their bill in the State court of Texas they were asserting rights junior to, and arising after the arrest of property had already been made by the execution of the mortgage (which was the subject matter of the foreclosure proceeding in the Federal court), in favor of the party in the Federal court.

The patent applicability to the instant case of this distinction of *Empire Trust Co.* v. *Brooks* is emphasized by the decision of this Court in *Pusey & Jones* v. *Hanssen*, 261 U. S. 491, as bearing upon the relative rights of the two classes of parties.—We assume the elementary proposition that "Lower federal courts are not superior to state courts" (*Leon Bonding and Surety Co.* v. *Karatz*, 262 U. S. 77, 90).

Under *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, a simple contract creditor, as such, has no greater right to the appointment of a receiver than has a stockholder. Nor can a

statute giving such creditor that right bind the corporation, or any other party, in any court other than those of the state of its creation (where its charter may constitute an agreement therefor by reason of special constitutional or statutory provision). The creditor only acquires the right to a receiver under a conservation bill when, as and only if, the debtor consents thereto subsequently to the creation of his debt (*In re Metropolitan Receivership*, 208 U. S. 90). Therefore if the remedy of appointment of a receiver is given to the creditor in the Federal court after the filing of the bill in the State court, and after the incidental arrest of property thereby effected by the State court, the creditor's rights must yield to the State court power.

The erroneous reasoning of the opinion in *Empire Trust Co.* v. *Brooks*, and the acceptance of that reasoning, rather than of the decision itself, by the Circuit Court of Appeals for the Seventh Circuit in the instant case, arises from the fact that in the opinion in *Empire Trust Co.* v. *Brooks* the court overlooks the fundamental characteristics of the lien asserted in the Federal bill in that case, and (pages 647-648) inadvertently misquotes the language of this Court, purposing to quote the following from *Moran* v. *Sturges*, 154 U. S. 256, 284, but omitting the matter indicated in italics:

> "As between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, *and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute.*"

(b) Palmer v. Texas, 212 U. S. 118.

We have analyzed this case above. As shown, this decision of this Court is in conflict with the decision in the case at bar, not an authority for it.

(c) Wabash Railroad Co. v. Adalbert College, 208 U. S. 3

This case, also, involved a mortgage foreclosure under ci cumstances falling within Exception (*b*), *supra*. The Cou also held that the Federal court having acquired jurisdictio by and with the consent of the parties to the State court pr ceeding retained jurisdiction of the *res* as against the Stat court by reason of the reservation in its decree, even thoug suit had first been brought in the State court.

(d) Farmers' Loan & Trust Co. v. Lake Street Elevated R Co., 177 U. S. 51.

This Court there held that the mortgagor, by the executio of the mortgage, consented to an arrest of its property i favor of the mortgagee, and, therefore, when the mortgage filed a bill in the Federal court to enforce such arrest o property, the mortgagor could not defeat the mortgagee' right to the property by filing a bill in the State court t remove the mortgagee as trustee. So in the case at bar, th owner (Daniel Boone Woolen Mills, Inc.) having consente to an arrest by the State court, can not defeat such arre by action taken later in the Federal court.

(e) Pacific Live Stock Co. v. Oregon Water Board, 241 U. S 440.

This case is not in point because there was not prese any dispute between the courts as to the control or posse sion of the same specific property; the question was sole the right of one court to enjoin proceedings pending in a other court.

(f) Moran v. Sturges, 154 U. S. 283.

Moran v. *Sturges* is an illustration of our Exception (*b supra*. The case involved the assertion of a maritime lien, an exclusively federal jurisdiction.

Applying the foregoing principles of law to the case at bar:

(*a*) Both suits involved in the instant case the taking of possession of the same property;

(*b*) Neither court had a superior right of possession by statute or prior action of the owner of the property.

(*c*) The commencement of the suit in the State court, the motion therein for the appointment of the receiver, the appearance and action of the defendant owner in placing its property under the power of the State court, preceded the filing of the bill in the Federal court and the consent therein of the corporation defendant to the appointment of a receiver.

(*d*) Therefore the Federal court, under the later bill, could not interfere with the previously attached power of the State court to take possession of the involved property.

C.

The decision herein is contrary to the holding of this Court in Farmers Loan & Trust Co. v. Lake Street Elevated Ry. Co., 171 U. S. 51. The Circuit Court of Appeals for the Seventh Circuit fails to give to the owner's pledge to the State court its legal effect as a deposit of the property with the State court and surrender by the owner to the State court of present control of the same.

"Physical possession of the property in dispute" (*Moran* v. *Sturges*, 154 U. S. 256, 284) is not an essential of priority of right of control. In *Palmer* v. *Texas*, 212 U. S. 118, this Court held that the property in dispute was in the constructive possession of the court in which suit was first brought, although the receiver therein had merely been appointed and qualified and had not reduced the property to physical possession. At what point, short of actual appointment and

qualification of the receiver, the arrest of property is effective, we believe, has never been directly and expressly settled by decision of this Honorable Court. Neither was this precise question raised or passed upon in the instant case (Opinion, Rec. 170-171). No better statement of the underlying principles can be found than the opinion of District Judge Sibley in *Patterson* v. *Veasey*, 295 Fed. 163, wherein, after an exhaustive review of authorities, including the latest expressions of this Court on the subject (*Kline* v. *Burke Construction Co.*, 260 U. S. 222, and *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77), the learned Judge, at page 165, says:

> "As to criminal cases it is settled that jurisdiction for the purposes of the rule attaches not on indictment but on arrest of the person. *In re Johnson*, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103; *Ponzi* v. *Fessenden*, 258 U. S. 254, 42 Sup. Ct. 309, 66 L. Ed. 607, 22 A. L. R. 879. *Arrest in criminal cases corresponds to service in civil cases, whether by personal notice or by seizure of some res.* Cases strictly in *rem*, in which jurisdiction arises in the court to act at all only on seizure or attachment of the *res*, may be laid to one side. So may those involving levy of general final process in the former, plainly 'jurisdiction attaches' only on seizure; in the latter, the court has no specific property to deal with until the officer selects and levies upon it. The language used in all such cases, of course, is of actual seizure as determining. In case of receivership, however, actual seizure is an impractical test, for it might easily happen that each receiver gets first actual possession of a part of the property; whereas, control of the whole is necessary for each court to exercise its jurisdiction in the premises. We find it accordingly ruled in many cases that the prior appointment of a receiver will take precedence, though there be no actual possession taken. It is enough to cite as controlling in each of the courts here involved: *Palmer* v. *Texas*, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435; *Inter-Southern Life Ins. Co.* v. *McQuarie*, 148 Ga. 233, 96 S. E. 424. *But the cases where prior appointment concurred with prior filing and service are not authorities to the effect that 'jurisdiction at-*

taches' only by appointing a receiver. Plainly such a rule might tend to hasty and improvident action and appointments, to appointments without hearing; might also lose to diligent creditors a choice of forum important to them, as in the case of a citizen of another state in his choice of a federal forum, and would put it in the power of a defendant by resisting one application and favoring another, to determine the priority of courts. The true rule is that the filing of the bill praying for a receiver, the sanction of it by the judge, and service in accordance with his order, perfects jurisdiction—'jurisdiction attaches' over the question of the receivership. **The appointment of the receiver does not create the jurisdiction but is the result of it. The right to take possession of the property comes from the original jurisdiction to make the appointment, and not from the appointment itself. The receivership is the assertion of the jurisdiction that has already attached and a means of exercising it."**

In *Havner* v. *Hegnes*, 269 Fed. 537, the Circuit Court of Appeals for the Eighth Circuit squarely holds that the filing of the bill of complaint, service on, or appearance of the defendant and the entry of a rule upon the defendant to show cause why a receiver should not be appointed, amounted to arrest of property.

In the instant case, the suit in the State court was instituted, the defendant appeared, the complainant's motion for the appointment of a receiver was made, formally entered, and continued to a date certain. But this is not all. When, on Monday, February 16th, 1925 (three days before the Federal court bill was even filed) the State court complainant presented in the State court his motion for the appointment of a receiver (Rec. 55), the corporation entered its appearance (formally as defendant, but in legal effect as complainant, the suit being a derivative proceeding) and asked for a continuance and pledged the court and opposing counsel that "the rights of the complainant under this bill, will not be affected in any way at all, by allowing this matter to go

over for a matter of a week or ten days'' (Rec. 56), and th
meanwhile the *status quo* would be preserved (Rec. 56-58
Thereupon, the State court formally entered complainant
motion and continued the same to Saturday, February 2
1925 (Rec. 55). This pledge by the owner of the propert
accepted and acted upon by the State court, amounted, in la
to a deposit of the property by the owner with the Sta
court and a surrender, by the owner, to the court, of prese
control of the property, subject only to a condition subs
quent, namely, the possible ultimate decision of the Sta
court not to take actual possession.

Farmers Loan & Trust Co. v. *Lake Street R. Co.*, 177 U.
51, and authorities applying the rule in mortgage foreclosu
cases (Our Exception (*b*), *supra*), establish that if the own
of property has promised control of property to one pers
he can not defeat such promise by later delivering actu
control to another person. So in the case at bar, the promi
to the stockholder and to the State court to leave control wi
the State court can not be defeated by the corporation
later delivering actual control to the Federal court.

Under *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, a sim
ple contract creditor, as such, has no right to possession
the property of his debtor. Any right of possession subs
quently acquired from his debtor speaks, necessarily, as
such subsequent date. Neither the Federal court plaintif
nor the Federal court receiver, was a purchaser (*Harner*
Hegnes, 269 Fed. 53, 541, last 6 lines).

II.

The decision herein (1926) conflicts with the prior decisions of the Courts of Appeal for the Third and Eighth Circuits. The Court of Appeals for the Seventh Circuit bases its decision upon the ruling, contrary to the prior rulings of the Third and Eighth Circuits, that in a conflict between a State and Federal court over possession of identical property, though the other necessary elements exist, the doctrine of arrest of property (constructive possession) is not applicable if (a) the formal parties plaintiff in the two suits are different, or (b) the suits are such that neither could have been brought by the complainant in the other.

In *Ward* v. *Foulkrod* (1920), 264 Fed. 627, the Circuit Court of Appeals for the Third Circuit holds that the doctrine of arrest of property (constructive possession) is applicable, the other necessary elements existing, when the involved suits are (as in the instant case) one, a simple contract creditor's bill and, the other, a stockholder's bill, neither of which could have been brought by the complainant in the other. To like effect are the decisions of the Third Circuit Court of Appeals in *O'Neil* v. *Welch* (1917, 245 Fed. 261, and of the Circuit Court of Appeals for the 8th Circuit in *M'Kinney* v. *Landon* 1913), 209 Fed. 300, *Havner* v. *Hegnes* (1921), 269 Fed. 337, and *Berg* v. *Fidelity Casualty Co.* (1921), 274 Fed. 311.

The contrariety of decision between the Circuit Courts of Appeal for the Seventh and Third Circuits strikingly appears from an examination of the decision of the District court in *Welch* v. *Union Casualty Co.*, 238 Fed. 968, reversed by the Circuit Court of Appeals for the Third Circuit in *O'Neil* v. *Welch*, 245 Fed. 261. This District Court decision (238 Fed. 261), in premises and conclusion, is exactly in line with, and adopts and applies the identical supposed tests adopted and applied in the decision of the Circuit Court of Appeals for the Seventh Circuit in the instant case.

So, too, is the decision herein of the Circuit Court of Appeals for the Seventh Circuit in conflict with the prior decisions of that Circuit. (See, *Gaylord* v. *Fort Wayne, N. C. R. Co.* (1874), 10 Fed. Cases, Fed case No. 5284, before Circuit Judge Drummond and District Judges Hopkins and Blodgett; and *McDowell* v. *McCormick*, 121 Fed. 651, the bills in which were filed by different judgment creditors to enforce separate individual rights, neither a class bill).

III.

The error of the Court of Appeals for the Seventh Circuit in holding that the two suits were dissimilar in nature, misconceives the true nature of the two proceedings and adopts a theory thereof contrary to the decision of this Court in In Re Metropolitan Receivership, 208 U. S. 290, and contrary to prior decision of the Court of Appeals for the Third Circuit.

Assuming, for the purposes of this Point, that in law there may be differences in suits short of our Exceptions (*a*) and (*b*), discussed under our Point I, *supra*, which render the doctrine of arrest of property (constructive possession) inapplicable, no such differences exist in the nature of the two suits involved in the instant case.

The Federal court creditors' bill admitted the solvency of the debtor corporation. The substantial ground set out for relief was the inability of the debtor to pay claims then due because of mismanagement of prior and present officers of the debtor. The substantial relief prayed for was that the court collect, take charge of, and preserve the assets for both creditors and stockholders.

The State court stockholder's bill was a class bill setting out facts showing the same inability of the debtor to pay claims because of mismanagement of prior and present offi-

cers of the corporation, as set out by the creditors' bill. The stockholder's bill likewise requested the court to collect, preserve and administer the assets of the corporation.

In *Ward* v. *Foulkrod*, 264 Fed. 627, the State court case was a statutory stockholder's bill alleging inability of the corporation to meet its obligations then maturing. The Federal court case was a simple contract creditors' bill, not statutory, alleging inability of the corporation, (admittedly solvent) to provide for its maturing obligations. Both bills prayed for a receiver to conserve the corporation's assets. The Court of Appeals for the Third Circuit sustained the jurisdiction of the State court in which the stockholder's bill was first filed, against the Federal court, though the appointment of a Federal court receiver and actual possession of the property preceded the appointment of the State court receiver.

In the case at bar, the Court of Appeals for the Seventh Circuit misapprehends the nature of the two suits.

It is elementary that a stockholder's suit against a corporation to recover or prevent dissipation of corporate assets is a derivative action (6 Fletcher's Cyc. Corp. 6864). The corporation is therefor the *real party* before the court, and the sole subject mater of the suit is the possession and administration of the corporation's property.

The exact nature of the creditor's bill in the case at bar is not so easy to define.

Whatever rights a simple contract creditor has in the property of a solvent corporation, such rights arise in the course of administration, *after* the property has been taken over by a court of equity. (*Hollins* v. *Brierfield Coal Co.*, 150 U. S. 371.) When the court of equity does take over the corporation's property, new rights are created in the administration by the court of these assets in favor of *all* interested parties, creditors and stockholders, as their interests appear (*Hollins* v. *Brierfield Coal Co.*, 150 U. S. 371).

Who then, is the real party before the Federal court of equity and what is the real subject matter of the suit? To reach a Federal court of equity, the necessary "controversy" and diversity of citizenship is effected through a non-resident creditor having a justiciable claim. Once the corporation becomes a party to such suit, the corporation invokes the court, as a court of equity, *not to satisfy* the justiciable claim of the creditor, but to administer the assets for *all interested* parties. Pending such administration, the plaintiff creditor's right to payment is held in abeyance and is subordinated to his right as one of the interested *cestuis* of the newly created trust (*In re* Metropolitan Receivership, 208 U. S. 90). The real party before the Federal court of equity is the corporation,—the real subject matter of the suit is the administration of the corporation's property.

It follows, even assuming, as, for the purposes of this Point it is assumed, that in law there may be differences in suits short of our Exceptions (*a*) and (*b*), discussed under our Point I, *supra*, which render the doctrine of arrest of property (constructive possession) inapplicable, no such differences exist in the nature of the two suits involved in the instant case.

IV.

The Federal Court was without jurisdiction under Section 37 of the Judicial Code. Under the facts, the instant case does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, and the parties were improperly and collusively joined for the purpose of creating a case cognizable under the Code.

In drawing the line between a case which is collusive and one which is not, this Court has said in *Dawson* v. *Columbia, Etc., Trust Co.*, 197 U. S. 178, that "the decisions on the

two sides of the line are very near to each other." It is a question, therefore, of degree, and the decision in any particular case must depend upon the facts before the court in that case. But this Court has laid down certain general principles by which the conduct of the parties may be gauged in the determination of the issue of collusion:

(1) "So long as no improper act was done by which the jurisdiction of the Federal court attached, the motive for bringing the suit therein is unimportant" (*In Re* Metropolitan Receivership, 208 U. S. 290).

(2) The mere fact that the parties preferred the Federal court to the State court does not show collusion, provided there is no evidence "of any fraud practiced for the purpose of thereby creating a case to give jurisdiction to the Federal court" (*In Re* Metropolitan Receivership, 208 U. S. 290).

(3) "The Court will look beyond the pleadings and arrange the parties according to their sides in the dispute" (*Dawson* v. *Columbia, Etc. Trust Co.*, 197 U. S. 178).

(4) When that is done, and it is found that the real party before the court has done an improper act to procure jurisdiction, or that the real controversy before the court is one which is created to defeat adjudication in the State court, the jurisdiction conferred by the action of the parties on the Federal court is considered collusive (*In Re* Metropolitan Receivership, 208 U. S. 290; *Dawson* v. *Columbia, Etc. Trust Co.*, 197 U. S. 178; *Lord* v. *Vessey*, 8 Howard 251; *Cashman* v. *Amador & Sacramento Canal Co.*, 118 U. S. 38).

Applying these principles to the case at bar we find:

1. The real party before the court is the corporation.

2. The real controversy before the court is the administration of the assets of the corporation for the benefit of stockholders and creditors.

3. There is no collision of interest (controversy) between the real party before the court, the corporation, and the other party, the creditor; the interest of both is identical as to the real controversy.

4. This identical interest of the two parties is antagonistic to the interest of other parties not present in the Federal court.

5. The Federal court jurisdiction is invoked to enforce this common antagonistic interest of both parties against the State court complainant.

6. In invoking this Federal jurisdiction the real party to the controversy improperly acts in fraud of the jurisdiction previously conferred by it upon the State court.

7. In invoking the Federal jurisdiction both parties improperly act in that (*a*) they both have knowledge that the same real controversy is pending in the State court with the corporation as the real party before the State court, and in that (*b*), with full knowledge of such pending controversy in the State court, they invoke Federal jurisdiction to defeat adjudication of that controversy by the State court. Such invocation of Federal jurisdiction this Court says, in *Dawson v. Columbia, Etc., Trust Co.*, 197 U. S. 178, will not be tolerated in the Federal court.

The only substantial relief prayed for, and before the Federal court of equity is itself a fraud on the State court,—the evasion of the effect, in law and in equity, of the corporation's pledge to the State court. It follows that the equity jurisdiction, fraudulently invoked by the corporation through the device of a nominal creditor plaintiff, taints the whole proceeding as collusive.

Both parties in the Federal case contemplated the administration of the assets of the corporation as the real, the substantial relief sought. Although the bill recites (Rec. 3) that

the purpose of the suit is that "of enforcing the claim of complainant," it is obvious that such enforcement of its claim is intended to be through the means specified in the prayer of the bill (Rec. 8) that the assets of the defendant be "declared to be a trust fund to be held and administered for the benefit of the plaintiff and the other creditors and stockholders of said defendant."

That Daniel Boone Woolen Mills, Inc., its officers and counsel, at all times contemplated and sought exactly this general administration of the corporation's affairs in the Federal court, is evident from the fact that the idea of seeking the appointment of a receiver by the Federal court was conceived by the defendant corporation itself (Rec. 103) and that, to this end, it first solicited a stockholder to act as nominal plaintiff and switched to a creditor only on the advice of the non-resident stockholder's counsel that a creditors' bill would be more effective for the corporation's purpose.

The Federal court plaintiff turned over its claim to the counsel, till then, for non-resident stockholders, "for the protection of the company and creditors and stockholders of the Boone Woolen Mills," "for the purpose of having a receiver appointed in the Federal court" (Solomon, Vice President of the deft. Co., Rec. 105-106),—"to apply for a receiver in the Federal Court for the conservation of assets for the benefit of the creditors and stockholders" (Philipson, Chicago Agent of the Fed. Ct. pltf., Rec. 95).

That the Federal court plaintiff merely lent itself to the defendant corporation as an instrumentality to invoke Federal jurisdiction, further appears from facts,—among others, that it moved in the matter only at the solicitation of the defendant corporation, that it made no demand on the defendant corporation for the payment of its supposed debt, and, further, as we contend, that its debt was not even due.

There is not a scintilla of evidence in this record that at the time of the filing of the Federal bill plaintiff's claim was past or presently due, and the sworn bill of complaint herein does not so allege. The bill is so cleverly drawn that an unsuspicious reading does not disclose the pleader's artifice and avoidance of the necessary affirmative showing that the debt was due. (It is elementary that there are no presumptions of jurisdiction, but that the same must affirmatively appear.) The bill alleges (Rec. 3) that the defendant is "indebted" to the plaintiff and refers to the "claim" of the plaintiff, but elsewhere in the bill (Rec. 4) the same, or equivalent terms, are invariably used as referring to non-due items, and whenever the bill mentions presently or past due items (Rec. 4-5) the fact that such items are presently or past due is expressly stated.

It is thus established that the instant suit does "not really and substantially involve a dispute or controversy" between the nominal plaintiff and the defendant, and that "from the very beginning, the suit was and is in reality the suit" (*Cashman* v. *Amador and Sacramento Canal Co.*, 118 U. S. 38) of the Daniel Boone Woolen Mills, Inc., with a party plaintiff "collusively made," "for the purpose of creating a case cognizable" by the Federal court.

V.

Such resort as in the instant case to a Federal court to evade the jurisdiction of a State court, if sustained and maintained, will result in utter disregard of necessary mutual adjustments of power between these two independent judicial systems.

Kline v. *Burke Construction Co.*, 260 U. S. 226, 235.

The importance of the questions presented and the likelihood of their recurrence, merit the issuance of the writ.

Respectfully submitted,

LLOYD C. WHITMAN,
BERNHARDT FRANK,
Counsel for Petitioners.

OCT 27 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926.

No. 117

DANIEL V. HARKIN AND UNION BANK OF CHICAGO,
RECEIVERS, ETC.,
Petitioners,

vs.

EDWARD J. BRUNDAGE, RECEIVER, ETC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

LLOYD C. WHITMAN,
BERNHARDT FRANK,
Counsel for Petitioners.

HARRISON & LEDDEN CO., LAW PRINTERS, CHICAGO

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners herewith supplement their original supporting brief, heretofore filed under the same cover with their petition for certiorari (writ allowed November 23, 1926), in order to clarify and answer positions taken by respondents in their extended answer to the petition.

Respondents' major premise of law is counsel's bland assertion (Answer, page 6) that the opinion of this Honorable Court in *Palmer* v. *State of Texas*, 218 U. S. 118, "is of no value" because this Court there so misapprehended the questions before it that "the substance" of that case was not "touched upon" in the opinion therein,—that this Court's

opinion in that case was "talk of impossible and irrelevant things" (Answer, page 8). Counsel's rhapsodic contemplation (Answer, page 7) of Hobhouse's "Morals in Evolution" and "Social Development, Its Nature," etc., perhaps explains their overlooking the significant fact that the several Circuit Courts of Appeal are unable to adopt counsel's cavalier dismissal of the deliberate pronouncements of this Court in *Palmer* v. *Texas*, and this Court's uncritical citation of *Palmer* v. *Texas*, in *Lion Bonding Insurance Co.* v. *Karatz*, 262 U. S. 71, 89.

Respondents' major premise of fact is a misstatement of the record. Counsel say (Answer, page 35, italics respondents'), "The bill filed in the District Court prayed that *all* the assets of the corporation * * * be distributed among the creditors." The very bill of complaint in the federal court alleges (R. 4) that the defendants' assets "exceed its liabilities by more than $1,500,000." In fact, as the record shows (Bill, par. fifth, R. 8), what the bill prays is that *all* of the assets be "administered for the benefit of the plaintiff and the other creditors *and stockholders* of said defendant, and "that the assets of said defendant may be ascertained, marshalled and administered and the rights, interests and equities of all creditors, shareholders and others in respect therein be ascertained and adjudged;" that (Bill, par. 6, R. 8) "the property and assets of the defendant may be ordered sold, * * *, and that the proceeds of any such sale be distributed among those entitled thereto as this court shall determine."

Mixture of law and fact, entering, in one way and another, into the whole argument of the first 63 pages of respondents' answer, is the further premise (Answer, page 36, italics respondents') that "*not an issue that could possibly be determined in the Superior Court was involved in the proceeding in the District Court.*" This assertion is not borne out by the record. The federal court bill prays (Bill, par. 6, R. 8)

that "all of the property and assets of every name and nature, both legal and equitable, belonging to said defendant, be * * * administered for the benefit of the plaintiff and the other creditors and stockholders." Such an administration would of necessity include determination and disposition by the federal court of every issue, subject matter, and relief sought or possible in the state court proceedings, with the sole exception (peculiar to the state court just as the question of the plaintiff's citizenship was peculiar to the federal court) of the complainant stockholders' right to institute the derivative proceedings. Whether involved courts are courts of concurrent jurisdiction—whether each court has "the power to deal with the general subject involved in the action" in the other court (see Answer, Page 85), is a question of its potential jurisdiction, not of its power so to do in the particular case then pending, and is not determined or controlled by distinctions turning on qualifications of particular parties plaintiff. Such distinctions "fail to reach or destroy the underlying * * * general equitable jurisdiction" but are all mere "impediments or obstacles to the exercise of that jurisdiction."

Broadly speaking, possession of the property and operation of the business of the defendant corporation by either court would necessarily draw to that court all questions incidental to such possession and operation (*Farmers Loan & Trust Co.* v. *Lake St. El. Ry. Co.*, 177 U. S. 51, 61.)

Inferentially, the premise of counsel's attempted differentiation of the two proceedings (Answer, pp. 14-16, 35) on the ground that the state court could not dissolve the defendant corporation, is the erroneous assumption that the federal court, in the proceedings therein pending, could dissolve the corporation. But counsel themselves admit (Answer, page 14) that the federal court bill "states no cause of action under Sections 51 and 53 of the Corporation Act" of Illinois.

Points I, II and III, pages 1-63 of respondents' answer, hopelessly confuse "infringement of jurisdiction" of *causes*

and "interference with possession" of *property*, and thus deduce that there can be no litigable conflicting claims of right to possession of property—no constructive possession of property—unless there is an "infringement of jurisdiction" of identical causes of action,—unless "*the issues involved, relief prayed for, and parties to the two suits are so substantially alike that the lis pendens of the last brought is included in the first*" (Answer, pages 48-49, quoting *Empire Trust Co.* v. *Brooks*, 232 Fed. 641). Counsel ignore the nature of so-called conservation proceedings as elucidated by this Court in *In Re* Metropolitan Railway Receivership, 208 U. S. 90, and overlook (Answer, p. 62), the application to the instant case of the holding in *Ward* v. *Foulkrod* (C. C. A. 3rd Cir.), 264 Fed. 627, 633 (See, Our Original Brief, pages 19 & 21), that the real controversy was the same in both federal and state court.

And counsel assert (Answer, page 65) that your petitioners' challenge the jurisdiction of the federal court upon the sole ground that the property in dispute was in the constructive possession of the state court, resting this assertion (Answer, page 65-66) on the two closing paragraphs of the petition of March 13, 1925 (R. 21). The latter of these two paragraphs charges that "by reason of the premises" the federal court was without jurisdiction to appoint a receiver. Among the "premises" thus referred to are the allegations of the petition of the circumstances, *so far as then known to your petitioners*, of the filing of the federal court bill, including the charge (R. 19-20) that the defendant corporation brought about the filing of the federal court bill to evade the jurisdiction of the state court and deprive the complainant in the latter case of all remedy in the premises,—as it were (*Ward* v. *Foulkrod*, 264 Fed. 627, 635), "to play one court against another * * * to defeat rather than to aid the administration of justice."

The motion and petition of March 13, 1925 (R. 21), presented all the facts then known to your petitioners. When

the matter came on for hearing, your petitioners, *per force*, called as witnesses the very conspirators, Messrs. Cowan, Byfield, Phillipson and Solomon. The truth would never have been uncovered but for the happy circumstance that Mr. Solomon was placed on the stand and compelled to testify knowing that Cowan, Byfield and Phillipson had already committed themselves (R. 107), but in ignorance of what their testimony had been (R. 102). The applicability of Section 37 of the Code turns not on what little your petitioners knew or could guess on March 13, 1925, but upon the full facts as disclosed by Solomon's enforced frankness.

And the basis of this whole branch of counsel's argument is the false premise that the jurisdiction of the District Court as a federal court not only cannot be attacked for the first time upon appeal (See *C. B. & Q. R. R. Co.* v. *Willard*, 220 U. S. 413, 419, and cases cited), but, furthermore, that the question must be raised at the earliest possible moment and when raised must include a definite and specific application by the party litigant for all relief possibly available under Section 37 of the Code. This is a misapprehension of Section 37 which contemplates that whenever the lack of jurisdiction comes to the attention of the court it shall be the duty of the court, *sua sponte*, to "proceed no further therein, but dismiss the suit." Your petitioners' motion and prayer (R. 16) to the District Court for an order on the federal court receiver to surrender possession of the disputed property to your petitioners was, in effect, a motion and prayer that as to the property the District Court, in the language of Section 37 of the Code, "proceed no further." Any further motion by your petitioners (Compare Answer page 2, and Point IV, Answer pages 64-67) would properly come in when your petitioners, by substitution of attorneys, were in a position to move in the name of the defendant company.

The contention that in the federal court the immaturity of the defendant company's alleged obligation to the plaintiff

could be waived by the defendant company (Answer, page 82),—that the state court receivers had "no other or greater rights than said defendant" (Answer, page 86)—utterly ignores the status previously effected by the proceedings in the state court on Monday, February 16, 1925 (See Pet. for Cert. pages 2-3, 17-18), and your petitioners' succession (upon their subsequent appointment, on and pursuant to the motion of February 16, 1925, R. 69-70, and qualification accordingly, R. 70) to the rights incident to this status, as of Monday, February 16, 1925.

Counsel have not so far had the temerity to contend that either the federal court plaintiff or the federal court receiver was a purchaser (See Pet. for Cert. pages 18, 22), or that there is anyone in a position to claim an estoppel as against your peitioners or the state court complainant. To and including March 13, 1925, when your petitioners filed in the federal court their formal motion and petition of that date, no creditor, stockholder or other persons had intervened or become party to the federal court proceeding (R. 23). At most the situation is that in *Shields* v. *Coleman*, 157 U. S. 169, 182, where this Court said, "Whatever of hardship there may be, whatever expense may result, must fall upon the parties who have thus wrongfully secured the taking away of the possession of the property from the custodian rightfully appointed by the state court. The mere forcible continuance of possession by the federal court does not transform that which was in the first instance wrongful into a rightful possession."

As held by the Circuit Court of Appeals in the instant case (Opinion, R. 170-171), the state court had jurisdiction to appoint receivers. The Superior Court of Cook County, Illinois, sitting in chancery, is a court of general jurisdiction (*C. & N. W. Ry. Co.* v. *C. & E. I. R. Co.*, 112 Ill. 589, 597; *Kenney* v. *Greer*, 13 Ill. 432, 438). Its jurisdiction was not dependent upon the sufficiency of the bill, upon plaintiff's

right to the relief demanded, upon the regularity of the proceedings, or upon the correctness of the decision rendered (15 Corpus Juris, 735; *Lion Bonding Insurance Co.* v. *Karatz*, 262 U. S. 77, 90; *Griswold* v. *Hazard*, 141 U. S. 260, 290, 35 L. ed. 678; *Herron* v. *Dater*, 120 U. S. 464, 477, 30 L. ed. 748; *Windsor* v. *McVeigh*, 93 U. S. 274, 288, 23 L. ed. 914; *O'Brien* v. *People*, 216 Ill. 354, 363).

The state court bill no more than the federal court bill (Answer, page 14) proceeded under Sections 51 and 53 of the Illinois Corporation Act. But decisions or statements by the Illinois courts (See Answer, pages 15-21, 89) that Illinois courts of equity have no authority to appoint a receiver of a corporation *as an incident to dissolving the same* except in cases in which dissolution is authorized by the Illinois Corporation Act, are beside the mark. The Illinois court is without jurisdiction to dissolve a corporation except as authorized by the Illinois Corporation Act and otherwise has, therefore, no jurisdiction to appoint a receiver *for that purpose*, or to appoint a receiver (to quote from *People* v. *Weigley*, 155 Illinois 491, 502) as "a mere incident to that relief." The Illinois Supreme Court in indicating, *arguendo*, in *Blanchard Bro. & Lane* v. *The Gay Co.*, 289 Ill. 413, the necessary elements of a simple minority stockholder's bill, invoking exercise of the chancery court's common law as distinguished from statutory power to appoint a receiver, lays down no new rules, but merely classifies and brings together the rules on this subject which have long obtained in Illinois (*Merrifield* v. *Burrows*, 153 Ill. App. 523; *Schmidt* v. *Johnson*, 166 Ill. App. 623, and, generally, in the federal courts, *Burnrite Coal Briquette Co.* v. *Riggs*, 47 Sup. Ct. 578, 579; Adv. Op. 71 L. ed. 660, 661).

In the instant case (Op. R. 171) the Circuit Court of Appeals declares the applicable rule to be "that if the two suits were different, there was no conflict of jurisdiction [interference with possession], and the court which first acquired

jurisdiction over the *res* by actual seizure through its receiver should retain jurisdiction [possession]." For authority *of this Court* for that ruling counsel for respondents' place their reliance (Answer, page 62) upon *Moran* v. *Sturges*, 154 U. S. 256, which, as pointed out at page 14 of our original supporting brief [For "Exception (*b*)" read, "Exception (*a*)"], is merely an illustration of our "Exception (*a*)", namely, that when the court seizing the property is exercising an exclusive jurisdiction conferred upon it by the law of its origin or source of jurisdiction—as in admiralty—priority of actual seizure is controlling. In our original supporting brief (page 11) we present the correct rule as that constructive possession is controlling except under specified conditions going to whether the involved courts are courts of concurrent and co-ordinate jurisdiction. In the very case of *Moran* v. *Sturges*, 154 U. S. 256, 284, relied upon, as aforesaid, by respondents, the same rule is laid down though in different verbage (italics supplied):

> "As between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, *and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute.*"

Respectfully submitted,

LLOYD C. WHITMAN,
BERNHARDT FRANK,
Counsel for Petitioners.

No. 117

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

DANIEL V. HARKIN AND UNION BANK OF CHICAGO, RECEIVERS, etc.
Petitioners

vs.

EDWARD J. BRUNDAGE, etc., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER OF RESPONDENTS.

Ralph F. Potter
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Henry Jackson Darby
Solicitors for Respondents.

DARROW-MARBEN PRINTING COMPANY, CHICAGO.

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A conflict of jurisdiction arises only when the same controversy is presented to coordinate courts of concurrent jurisdiction for adjudication. In such cases the court that first acquires jurisdiction of such controversy has exclusive jurisdiction (of the controversy), which the other court is powerless to defeat by means of the mere prior seizure of the property incidentally involved.

But on the other hand, where the controversy is not the same there is no conflict of jurisdiction. And the court that in the exercise of its jurisdiction first seizes property of the defendant necessarily holds it against all the world until its jurisdiction of the controversy is exhausted. The mere fact that another court first acquired jurisdiction of another and different controversy against the same defendant is irrelevant 1

II.

The bill filed in the District Court by the United States Worsted Sales Co., a simple contract creditor, invoked the undoubted powers of said court to conserve and distribute the assets and property of the Daniel Boone Woolen Mills, Inc., among creditors.

(1) There was no conflict of jurisdiction between the District Court and the Superior Court, because

(a) Conservation proceedings as devised and developed by the Federal Courts are not only utterly unknown to the practice and procedure of Illinois courts, but contrary to the express decisions of the Supreme Court of Illinois. As a mere simple contract creditor the United States Worsted Sales Co. would have had no standing in the Superior Court, so far as the relief prayed for in the bill filed in the District Court was concerned. Neither could a simple contract creditor intervene or otherwise obtain any relief in the proceedings theretofore instituted in the Superior Court.

There was, therefore, no concurrent jurisdiction; and consequently no conflict of jurisdiction.

(b) The conservation proceedings instituted in the District Court were essentially different from the proceedings then pending in the Superior Court at the instance of a stockholder of the Daniel Boone Woolen Mills, Inc. The parties were different; the purpose of each proceeding was different; the subject-matter was different; the relief asked was different.

(2) It therefore follows that having first actually seized the property and assets of the Daniel Boone Woolen Mills, Inc., the District Court was entitled to hold them until its jurisdiction of the controversy pending in said court was exhausted 10

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IN THE

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I.

A conflict of jurisdiction arises only when the same controversy is presented to coordinate courts of concurrent jurisdiction for adjudication. In such cases the court that first acquires jurisdiction of such controversy has exclusive jurisdiction (of the controversy), which the other court is powerless to defeat by means of the mere prior seizure of the property incidentally involved.

But on the other hand, where the controversy is not the same there is no conflict of jurisdiction. And the court that in the exercise of its jurisdiction first seizes property of the defendant necessarily holds it against all the world until its jurisdiction of the controversy is exhausted. The mere fact that another court first acquired jurisdiction of another and different controversy against the same defendant is irrelevant.

It is undisputed that the District Court appointed a receiver for the Daniel Boone Woolen Mills, Inc., and

that such receiver took actual possession of all the property of said corporation *more than one week before* the Superior Court of Cook County undertook to appoint receivers for the same corporation and the same property (Tr. 12-15, 69).

Nearly one month after the appointment of the receiver by the District Court, the would-be, or supernumerary, receivers appointed by the Superior Court petitioned the District Court for—

> (a) An order directing the receiver appointed by said court to deliver to petitioners all the property of the Daniel Boone Woolen Mills, Inc., and
>
> (b) "leave to substitute said State Court Receivers' attorneys, Messrs. Blum, Blum & DeLaney, as solicitors in the above entitled cause for said Daniel Boone Woolen Mills, Inc., to the end that said State Court Receivers may and shall control and dictate the acts and doings of said Daniel Boone Woolen Mills, Inc., as defendant in the above entitled cause." (Tr. 16-17).

This anomalous petition—which recognized and invoked the jurisdiction of the District Court—was *not* in the alternative. *The District Court was not asked to dismiss the suit pursuant to Section 37 of the Judicial Code*; neither did the petitioners aver any facts which evidenced an intention to rely upon said section, or which made out a case thereunder.

It is a fact that the *filing* of the bill in the Superior Court antedated the *filing* of the bill in the District Court by five days—the former bill having been filed on February 14, 1925, (Tr. 17), the latter bill having been filed on February 19, 1925, (Tr. 2). But, whereas, the District Court appointed a receiver (who immediately took actual possession of all the defendant's property) on February

19, 1925, the Superior Court did not undertake to appoint receivers until February 28, 1925, (Tr. 69). And not until March 13, 1925, was the anomalous petition above mentioned filed in the District Court (Tr. 16).

This petition was based solely upon the preposterous ground that because on February 16, 1925, the plaintiff in the Superior Court had made a motion for the appointment of a receiver—

> "said Superior Court of Cook County acquired jurisdiction to determine the question of the propriety of the appointment of such receiver * * * * and by reason of the premises said Superior Court of Cook County acquired on February 16, 1925, *constructive possession* of all the assets, property and books of the said Daniel Boone Woolen Mills, Inc., *and the prior right and jurisdiction*, as against any court proceeding in *a cause thereafter instituted, to take actual possession* of the books, property and accounts of said Daniel Boone Woolen Mills, Inc., *by and through the appointment of a receiver* or receivers of and for said last mentioned company, its property, assets and books." (Tr. 21).

Of course the appointment of a receiver is a mere incident to the ultimate relief sought.

It is equally true that courts never deal with material things, but merely declare the legal relations that exist between juristic persons. But let us waive this last point.

Neither need we embark on any discussion of that most important and interesting subject of *possession*, which has engaged the attention of so many subtle and brilliant minds since the days of the jurisconsults.

It suffices to state that courts have jurisdiction of *causes, or controversies*, which may or may not involve

property. Where the same *controversy* is presented to two different courts for decision there arises *a conflict of jurisdiction*. In *such cases* the court which first obtains jurisdiction of *the controversy* is entitled to retain it without interference, and cannot be ousted because it may not have first seized the property involved. And what the other court surrenders is jurisdiction of *the controversy*. The suit pending in such court is dismissed,—the *property* involved necessarily following *jurisdiction* of the *controversy*.

But where different *controversies* are presented to different courts for adjudication, *then there is no conflict of jurisdiction*. Each court retains jurisdiction of the particular controversy before it. And *in such cases* the court which first seizes the property of the defendant will hold said property until its jurisdiction of the particular controversy before it is exhausted.

Why should one court which has jurisdiction of *one* controversy, and which in the exercise of such jurisdiction has first seized property of a defendant, turn it over to another court that has jurisdiction of another and different controversy? . . . . . Courts are numerous, controversies are as multitudinous as the stars and new ones arise endlessly. Conflicting interests and claims inevitably lead to a struggle for the possession of the property of debtors. *Disparate causes of action against one individual may be simultaneously held by divers persons who may properly apply to different courts for relief*. And in such cases the property of the defendant is virgin to the court that first actually seizes it. Of necessity such property is held against all the world until the termination of the controversy before

such court. The foregoing principles are elementary, and have been repeatedly announced by this Court.

Moran v. *Sturges*, 154 U. S. 256.

Pacific Live Stock Co. v. *Lewis*, 241 U. S. 440, 447.

Helm v. *Zarecar*, 222 U. S. 32, 35—decision with respect to 2nd plea, which is not incorporated in the syllabus.

Empire Trust Co. v. *Brooks* (C. C. A. 5th Cir.), 232 Fed. 641—the most exhaustive and illuminating discussion of the subject in the books, by a judge of unusual powers of analysis and generalization.

De La Vergne Refrigerating Mach. Co. v. *Palmetto Brewing Co.* 72 Fed. 579.

Jackson v. *Parkersburg* v. *O. V. Electric Ry. Co.*, 233 Fed. 784.

Jones v. *Maxwell Motor Co.* (Del.), 115 Atl. 312

Knott v. *Evening Post*, 124 Fed. 342.

Knudsen v. *First Trust & Savings Bank* (C. C. A. 9th Cir.), 245 Fed. 81.

15 Corpus Juris, pp. 1163-64-71.

The case of

Farmers' Loan Co. v. *Lake Street Railway Co.*, 177 U. S. 21, 44 L. ed. 667

is not contrary to the foregoing fundamental principles. As pointed out in

Empire Trust Co. v. *Brooks*, 232 Fed. 641,

"• • • • • in the case of *Farmers' Loan Co.* v. *Lake Street Ry. Co.*, *supra*, the suit in the

> federal court was an action to foreclose a mortgage, and that in the State Court sought to enjoin foreclose."

In other words, the CONTROVERSY IN EACH CASE WAS THE SAME. And inasmuch as the Federal Court in that case had first acquired jurisdiction of the *controversy*, it was held that its jurisdiction (of said controversy) was exclusive.

We admit that the case of

Palmer v. *State of Texas*, 212 U. S. 118.

may not so easily be brought within the foregoing principles if only the language of the opinion be regarded. However, it offers no comfort to petitioners, for in that case the state court *first appointed a receiver, who duly qualified* BEFORE *the filing of the bill in the federal court.* On page 129 the Court (speaking through Mr. Justice Day) say:

> "We think the law of this court is well established to be that jurisdiction over the *property* was acquired by the state courts *when the receiver was appointed, the judicial process served, and the receiver duly qualified*, although the state receiver had not taken actual possession of the property. This principle was recognized in *Farmers' Loan & Trust Co.* v. *Lake Street Electric Ry. Co.*, 177 U. S. 51, 61 xxx",

The opinion in that case (212 U. S. 118) is of no value as a precedent, for the reason that the point argued by counsel and determined by the Court was whether the federal or the state court had *jurisdiction* of the defendant's *property*. Of course, courts have jurisdiction only of *controversies;* and neither the argument nor the opinion touched upon the substance of the case.

What is the historical view of courts? How did they arise, what is their function, of what have they jurisdiction?

In the most primitive societies private wrongs were revenged by private individuals and such others as could be induced to assist. This method generally led to blood feuds which imperilled the entire community. In more advanced societies the avenger was either assisted or controlled by public force, or could get the judgment of a public court to sanction his act. In yet more advanced societies a regular system of justice deals normally with all serious disputes and grave offenses.[1]

> "The primary function of a primitive tribunal is not so much to discover the merits of the case and make an equitable award, as to keep the peace and prevent the extension of wild and irregular blood feuds."[2]

The primitive "court" is a peacemaker rather than a judge (Morals in Evolution).

Finally, came impartial tribunals, which heard evidence and endeavored to render to each man his due. But even today courts never act in the absence of a *breach of duty*. And they never act *sua sponte*. Some (juristic) person must invoke them. *The judicial function is the imposition of sanctions for breach of duty in concrete cases.*

It necessarily follows, therefore, that courts have jurisdiction only of *controversies*. The statutes (and

[1] Morals in Evolution, (4th ed.) by L. T. Hobhouse.
Social Development, Its Nature and Conditions (1924) pp. 246 *et seq.* by L. T. Hobhouse.

[2] Morals in Evolution, p. 114

constitutions) creating courts and defining their jurisdiction may be profitably consulted in this connection.

Jurisdiction is the power to hear and determine a *controversy*, which may or may not involve property. In any case the property is a mere incident. (Courts merely declare the legal relations that exist among juristic persons. They never seize property, neither have they jurisdiction over it. And property *in custodia legis* is a fiction as unnecessary as it is transparent.)

Conflicts of jurisdiction arise, therefore, only when the *same controversy* is presented to different courts for decision. Where *different* controversies are pending in two or more courts there can be no *conflict of jurisdiction*.

And where it is claimed that a conflict of jurisdiction exists, to inquire which court had jurisdiction over *property* is to talk of impossible and irrelevant things.

As a matter of fact, the case of

Palmer v. *Texas*, 212 U. S. 118,

involved a *conflict of jurisdiction*. In other words, the *same* controversy was presented to both the state court and the federal court for decision.

After a judgment imposing heavy penalties upon the Waters-Pierce Oil Co. and forfeiting its license to do business within the State of Texas, the State filed an application in the State Court for the appointment of a receiver. The previous judgment was recited; and it was averred that the property of the defendant within the State was inadequate to satisfy said judgment, that most of its assets consisted of personal property

which might easily be moved into other states; that the State of Texas had a lien on all such property (212 U. S. 113); "that the judgment of forfeiture prevented the Company from doing business in the state; and that it was necessary, to protect the rights of the state, that the business of the defendant should continue, at least temporarily" (158 Fed. 705, 706); a receiver was asked, as well as an injunction restraining the defendant from removing its property from the State.

The State Court granted the application for a receiver entered the injunction, and the receiver duly qualified.

Thereafter a stockholder filed his bill in the Federal Court. He recited the original proceedings in the State Court, the imposition of the heavy penalties, the forfeiture of the defendant's license to do business, and asked for a receiver in order that the business of the company might be temporarily managed, its property sold, and its business wound up (212 U. S. 118, 123).

In other words, both plaintiffs relied upon the same facts, viz., the prior judgment, forfeiture of license, inability of the defendant to carry on its business, necessity for conserving its property and winding up its business.

The controversies between the two plaintiffs and the defendant were identical. Their purpose was the same. Their subject-matter was the same.

And inasmuch as the State Court first obtained jurisdiction of the *controversy*, it could not thereafter be ousted.

Let us now determine whether the controversy presented to the District Court was the same as the controversy then pending in the Superior Court.

II.

The bill filed in the District Court by the United States Worsted Sales Co., a simple contract creditor, invoked the undoubted powers of said court to conserve and distribute the assets and property of the Daniel Boone Woolen Mills, Inc., among creditors.

(1) There was no conflict of jurisdiction between the District Court and the Superior Court, because

(a) Conservation proceedings as devised and developed by the Federal Courts are not only utterly unknown to the practice and procedure of Illinois courts, but contrary to the express decisions of the Supreme Court of Illinois. As a mere simple contract creditor the United States Worsted Sales Co. would have had no standing in the Superior Court, so far as the relief prayed for in the bill filed in the District Court was concerned. Neither could a simple contract creditor intervene or otherwise obtain any relief in the proceedings theretofore instituted in the Superior Court. There was, therefore, no concurrent jurisdiction; and consequently no conflict of jurisdiction.

(b) The conservation proceedings instituted in the District Court were essentially different from the proceedings then pending in the Superior Court at the instance of a stockholder of the Daniel Boone Woolen Mills, Inc. The parties were different; the purpose of each proceeding was different; the subject-matter was different; the relief asked was different.

(2) It therefore follows that having first actually seized the property and assets of the Daniel Boone Woolen Mills, Inc., the District Court was entitled to hold them until its jurisdiction of the controversy pending in said court was exhausted.

On February 19, 1925, the United States Worsted Sales Company, a citizen of the State of New York, filed its bill in the District Court against the Daniel Boone Woolen Mills, Inc. The bill showed that the defendant owed the plaintiff $6176.43 for goods, wares and mer-

chandise sold and delivered, and that there were no offsets or counterclaims in favor of the defendant. It also showed:

That as of December 31, 1924, the balance sheet of the defendant showed that said defendant had current assets consisting of cash, notes and accounts receivable, raw materials, goods in process and finished merchandise of the value of $1,036,076.39; current liabilities of $222,446.19; fixed assets, such as factory sites, buildings, machinery, etc., which were carried on the defendant's books at the value of $1,664,063.41; mortgage indebtedness of $412,500.00, and a deficit of $2,678,496.50 (Rec. 3-4).

That "*the defendant * * * is now unable to meet its maturing obligations.*" That interest payments on mortgages were past due and unpaid; that the defendant was unable to pay bank loans amounting to $30,000, which were then past due, and payment of which had been demanded; that defendant's outstanding notes aggregating $75,000, had been protested; that the defendant's Federal Capital Stock tax was unpaid; that there were other large claims against the said defendant, and that the defendant had only $6000, in cash on hand, which was insufficient to meet its current weekly payroll (Rec. 406).

That "*the defendant is wholly without funds with which to pay any of the foregoing obligations, and has no means of obtaining funds with which to meet said obligations, except by the completion of its products now in course of manufacture and shipment of the same.*"

That the defendant then had orders of the value of more than $400,000, on hand, many of which were in process; that the assets and property of the defendant would be dissipated and lost, *if subjected to numerous claims of creditors in actions at law* (Rec. 6-7). That "this suit is brought for the *purpose of enforcing the claim of the complainant against the defendant, the determination of the claims of the creditors of the defendant, marshalling of the assets of said company, the sale and distribu-*

tion of said assets among its creditors, the appoin ment of a receiver for the conservation and prote tion of said assets and for the other relief herei after set forth." (Rec. 3).

The plaintiff prayed:

1. That it be permitted to file its bill of complai "for the benefit of itself and of all other creditors the defendant * * * who may choose, either by a quiescence or by intervention, to become parties here and to take the benefit thereof."

2. That a receiver be appointed forthwith "to ta charge of and manage the assets, property and busine of the defendant until the further order of this court. That the receivers be given the most ample powers specifying them. (Rec. 8-9).

3. That—

"* * * * the said receiver or receivers so a pointed be authorized to demand, sue for, collect, r ceive and take into possession all the goods, cha tels, rights, credits, moneys, effects, lands, tenement books, papers, choses in action, and all other pro erty and assets of said defendant corporation with the jurisdiction of this court, and to institute a prosecute suits at law or in equity for the recove of any assets, property or demands belonging to existing in favor of the said defendant.

That this court may order, direct and decree th all of the property and assets of every name a nature, both legal and equitable, belonging to sa defendant and within the jurisdiction of this cou be held and declared to be a trust fund to be he and administered for the benefit of the plaintiff a the other creditors and stockholders of said defen ant, and that the assets of said defendant may ascertained, marshalled and administered and t rights, interests and equities of all creditors, sha

holders and others in respect therein be ascertained and adjudged.

That at such time as may be found just and proper, the property and assets of the defendant may be ordered sold, as an entirety or otherwise, in such manner and on such terms and conditions as this court shall deem just and equitable, and that any such order or sale shall make proper and suitable provision for the preservation of all equities, rights, priorities, claims and liens of the creditors of the defendant, and shall provide for the sale of the property and assets of the defendant, subject to or free and clear from any and all liens and incumbrances, in total or in part, in such manner and upon such terms as this court may direct, and that the proceeds of any such sale be distributed among those entitled thereto as this court shall determine, and that the complainant may have such other and further relief in the premises as this court may deem just and proper, and as may be necessary fully to protect and enforce the rights and equities of the complainant and of all other creditors of the defendant." (Tr. 8-9).

4. For general relief.

Such bills originally caused immense controversy, but they are now too familiar to require even an explanation, much less a defense, of them.[3] They are, neverthe-

[3] In re Metropolitan Railway Receivership, 208 U. S. 90.

Hollins v. *Brierfield Coal & Iron Co.*, 150 U. S. 371.

Horn v. *Pere Marquette R. R. Co.*, 151 Fed. 626.

Burton v. *Peters Salt & Lumber Co.*, 190 Fed. 262.

Lukrig Collieries Co. v. *Interstate Coal & Dock Co.*, 281 Fed. 265.

Alcalay v. *Community Fuel Corporation*, 291 Fed. 686.

In re Connecticut Brass & Mfg. Co., 257 Fed. 445.

Walker v. *U. S. Light & Heating Co.*, 220 Fed. 393.

Cincinnati Equipment Co. v. *Degnan*, 184 Fed. 834.

Kessler v. *William Necker, Inc.*, 258 Fed. 654.

less, wholly unknown to the practice and procedure that obtain in the local courts of Illinois, and in most other States.

It is clear that the bill filed in the District Court states no cause of action under Sections 51 and 53 of the Corporation Act of 1919 (pp. 91-93, *infra*), for the reasons:

1. That it is not alleged that any stockholders of the Daniel Boone Woolen Mills, Inc., were responsible to said corporation "because of any unpaid stock liability."

2. That it is not alleged that the said corporation had been adjudged bankrupt, or that "an execution upon a judgment or decree of a court of record for the payment of money, after demand made by the officer" had been returned "no property found," or that it had remained unsatisfied for ten days after such demand, or that the corporation had dissolved, or that it had ceased doing business leaving debts unpaid.

The plaintiff did not seek to enforce stockholders' liability, if any. *Such was not the purpose of its suit.* It therefore follows that the plaintiff was remediless in the Superior Court, so far as sections 51 and 53 of the Corporation Act are concerned.

And of course the plaintiff could not have filed a creditor's bill, for the reason that a simple contract creditor must first reduce his claim to judgment, and have an execution issued and returned unsatisfied in whole or in part.

Sections 53 and 54 of the Corporation Act of 1919 are largely identical with section 25 of Chapter 32 of the

Illinois Statutes, which sections 53 and 54 superceded. Section 25 is set forth in the margin.[4] In

The People v. *Weigley*, 155 Ill. 491, 504,

the Supreme Court said:

> "We held in *Wheeler* v. *Pullman Iron and Steel Co.*, 143 Ill. 197, that the two clauses of the above section must be construed together, *and that the 'good cause' which must be shown by the second clause to authorize courts of equity 'to dissolve or close up the business of any corporation, to appoint a receiver therefor, with authority to wind up its affairs,' means some one or more of the causes mentioned in the first clause,—that is to say, courts of equity only have jurisdiction to so decree when certain causes exist, which are the doing or refraining from doing some act which shall subject the corporation to a forfeiture of its charter or corporate power, or allowing an execution or decree of any court of record for the payment of money, after demand made by the officers, to remain unpaid, or that the corporation has dissolved or ceased doing business, leaving debts unpaid.* It cannot be seriously contended that this bill shows the existence of any of these causes for dissolving the Northwestern Shoe Company at the time it was filed."

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[4] "If any corporation or its authorized agents shall do, or refrain from doing, any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record for a payment of money, after demand made by the officer, to be returned 'no property found', or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business leaving debts unpaid, suits in equity may be brought against all persons who are stockholders at the time, or liable in any way for the debts of the corporation, by joining the corporation in such suits, and each stockholder may be required to pay his pro rata share of such debts or liabilities to the extent of the unpaid portion of his stock, after exhausting the assets of such corporation. And if any stockholder shall not have property enough to satisfy his portion of such debts or liabilities, then the amount shall be divided equally among all the remaining solvent stockholders. And courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor, who shall have authority, by the name of the receiver of such corporation (giving the name), to sue in all courts and do all things necessary to closing up its affairs, as commanded by the decree of such court." (Quoted in *People* v. *Weigley*, 155 Ill. 491, 503.)

It is, therefore, clear that the bill filed by plaintiff in the Federal Court would not entitle it to any relief whatsoever in the Superior Court, so far as sections 51-54 of the Corporation Act of 1919 are concerned.

It is also certain that neither the Superior Court nor any other local (Illinois) court has jurisdiction of purely conservation proceedings such as were originally evolved by, and are now matters of course in, Federal courts. In

Weigley, Bulkley & Gray v. *The People*, 51 Ill. App. 51,

Mr. Justice Gary stated the facts as follows:

> "*September 9, 1892, Jacob Graff filed a bill in the Superior Court, stating that he was a stockholder in the Northwestern Shoe Company, a corporation at Belvidere, in Boone County, Illinois, and in substance that the corporation was in pecuniary difficulties, its property being attached, its business stopped, and that unless a receiver was appointed to conduct its business, its asserts would be sacrificed, title to property which it held upon condition of continuing business forfeited, and the plant go 'to wreck and ruin', so that the complainant would get nothing for his stock; all of which evil consequences might be avoided by conducting the business through a receiver until the stock of goods, raw material, and credits of the corporation could be converted into cash, and applied to the payment of its debits.*
>
> *On the same day the bill was filed, the corporation appeared and consented to the appointment of Robert W. Wright, of Belvidere, as receiver, and the court appointed him.*
>
> September 20, 1892, Chick Brothers, for whom Weigley *et al.*, were attorneys, recovered in the Circuit Court of Cook County, a judgment against the corporation, and September 27, 1892, an execution upon the judgment was, by direction of Weigley *et al.*, as such attorneys, levied by Ames, who was

sheriff of Boone county, upon some boots and shoes of the corporation, which were in the freight house of the North Western Railway at Belvidere. * * *

Weigley *et al.*, and Ames, knew before the levy, that Wright had been appointed receiver.

It is not necessary to state at length the proceedings which ended in orders for attachments of Weigley et al., and Ames, for contempt of the court in refusing to obey the order of the court to surrender to the receiver the boots and shoes levied upon, to reverse which orders this appeal and writ of error are prosecuted.

There are many cases which hold that where the property rights of a private corporation are involved or threatened, and the governing power of the corporation, upon the application of a stockholder to that power to seek a remedy in equity, refuses so to do, he may go into equity, stating such refusal and the grievance, and obtain relief. Morawetz on Corp., Sec. 241. But such application and refusal are conditions precedent (Ibid.) and it needs no authority that even in such case the relief must be such as the corporation is itself entitled to.

A corporation is entitled to no greater protection of its property than an individual, and was it ever held that either a corporation or an individual was entitled to the protection of a court of equity against the process of the law to collect debts, because of the effect upon the prosperity of the debtor? Under an assignment for the benefit of creditors under the statute, or upon a bill filed for a dissolution of a copartnership, or upon a bill by a creditor of a corporation, under section 25 of the statute concerning corporations, where assets are under judicial control for ratable distribution among creditors, stringent measures to prevent interference have been sanctioned.

Sercomb v. *Catlin*, 128 Ill. 556, 30 Ill. App. 258, is an extreme instance, and however arrogant and despotic in its tone, the quotation from the Rhode

Island court, made by us in 30 Ill. App. 261, is doubtless good law.

The question then is, had the Superior Court jurisdiction to make the orders to surrender possession of the goods levied upon, and the answer to this question depends upon the jurisdiction of the court over the subject-matter of the suit.

We lay out of view the allegation of the bill that the corporation had title to lands and buildings in Boone county, and that one object, not clearly stated, may be the ultimate disposition of that property, and also that the home of the corporation was there.

These objections, if valid, could perhaps be waived by the corporation as being in the nature of personal privileges. But this bill is a bold undisguised attempt to do what in Robinson v. Raulston, 35 Ill. App. 166, was attempted, under disguise, and condemned.

If the final dissolution of the corporation be considered as the object of the bill, the court had no jurisdiction. *Wheeler v. Pullman Iron & Steel Co.*, 32 N. E. Rep. 420, 43 Ill. App. 626, 143 Ill. 197, where the case was decided the same way upon other grounds.

And if the staving off of creditors be the subject of the bill, it is hardly possible that anybody would claim that a court of equity should do that. In any aspect of the case, the court had no jurisdiction of the subject-matter; no right, power or authority to grant the relief."

With respect to these same conservation proceedings, the Supreme Court (155 Ill. 491, 502) said:

"*The vital question in the case then is, as stated in our former opinion, 'whether the Superior Court in which the receiver was appointed, and in which the order was entered to turn over the goods, had jurisdiction of the subject-matter of the bill.*' The relief sought by the bill in this case was the dissolution of the corporation and settlement of its business. The appointment of the receiver was a

mere incident to that relief, to enable the court to take possession of the property and business of the company and finally wind up its affairs. *It is clear, if the court was without jurisdiction to grant the ultimate relief prayed by the bill, it had no power to appoint the receiver and authorize him to assume possession and control of the corporation assets. It is well settled by the decisions of this court as well as the authorities generally, that courts of chancery are without jurisdiction to decree the dissolution of corporations, except in so far as that jurisdiction is conferred by statute; and we deem it too clear for argument, that if the Superior Court had jurisdiction to adjudicate upon the subject matter of the bill of Jacob Graff and grant the relief therein prayed, that jurisdiction must be attributed to Section 25, chapter 32, of our statute*, and not to its general equity powers, sitting as a court of chancery.

* * *

To hold that, under this statute, whenever creditors of a corporation attempt to collect their just claims against it by action of law, stockholders may invoke the jurisdiction of a court of equity to take charge of all the company assets, and thus defeat the creditors, because the enforcement of their rights by authorized processes of law would result in embarrassment or loss to the company, would be to not only violate its plain provisions, but to allow it to be used to defeat the very purpose for which it was enacted. Here is a bill by a single stockholder, other stockholders not being made parties. Only a part of the creditors are made parties, others being given no opportunity to question the jurisdiction of the court or the sufficiency of the bill. *None of the causes for which, by the statute, courts of equity are authorized to take charge of corporations and close them up, are alleged.* That the ultimate relief prayed for cannot be lawfully granted by the court upon this bill, it seems to us, must be conceded. Can it be said, nevertheless, the court, in making the interlocutory order appointing the receiver, only proceeded irregularly, and therefore the validity of that order cannot be questioned in this proceedings? We think not. *Having no general equity powers in the*

case, and the bill wholly failing to bring it within the provisions of section 25, the Superior Court exceeded its jurisdiction in making the order which appellees are charged with violating, and that order must therefore be held void."

If a stockholder of the corporation could not maintain such a bill in the Superior Court it is clear that a mere *creditor* could not do so.

And again in

Gilbert v. *Block, Receiver*, 51 Ill. App. 516,

the Court held:

"*It is not one of the functions of a court of equity to supervise or carry on the business of parties between whom or about whose affairs there exists no controversy. If parties are in accord as to their respective rights, they have, as a rule, no occasion to apply to a court of equity to act as their agent in caring for their property.*"

It was there said:

"*Numerous cases can also be found, where the United States Circuit Courts, especially in operating insolvent railways, have exercised a paternal authority at the instance of receivers, but not calmly considered case, where the point has been made, justifies a receiver appointed only to take possession of and sell property—unless acting under some statute—in originating proceedings to make more effectual the remedy of one of the parties.*"

In

Gillespie, Receiver, v. *Illinois Steel Co.*, 62 Ill. App. 594,

the Court stated the facts as follows:

"The question in these cases concerns the title to three rolls such as are used in rolling steel rails.

Earl in May, 1893, the appellee ordered these

rolls from the Chicago Foundry Company. Two of them were completed on the 22d day of the same month, and the third was completed early in the morning of the 23d of that month. In the meanwhile the Chicago & Kenosha Railway Company had been requested by the foundry company to send a car to the foundry, which it did, and the two rolls were placed upon the car. The third roll was brought alongside the car ready for loading. Shipping instructions were given by the foundry company to the railway company, directing the transportation of the rolls to the Illinois Steel Company, and the receipt of the railway company was given to the foundry company for all three rolls.

Matters being in this situation, on the morning of the 23d of May, the Chicago Foundry Company and three of its stockholders filed a bill in chancery in the Circuit Court of Cook County against Henry A. Keith, the only remaining stockholder in the corporation. The bill alleged that the assets and liabilities of the plaintiff company were about equal, each amounting to about $60,000; that the company was indebted for labor and other claims in an amount exceeding $5,000; that its operation had been stopped by strikes; that it was unable to meet its debts as they matured; that it had large and profitable contracts which it was unable, under the circumstances to carry out; and that the board of directors had resolved that the corporation should be wound up.

The court below, as soon as the bill was filed, appointed a receiver, who took possession of all the property of the Chicago Foundry Company. The order appointing the receiver is as follows:

'On motion of plaintiff's solicitors, it is ordered that Thomas Gillespie be, and he hereby is, appointed receiver of the property in controversy herein, upon his giving a receiver's bond in the penal sum of $10,000, with surety to be approved by the court, with all the usual powers of a receiver in chancery.'

At the time the receiver was appointed, the

foundry company owed the steel company a little over $3,000. The rolls are worth somewhat more than $1,000, and the receiver, when he took possession of the foundry company's property, took possession also of these rolls, canceled the shipping directions which had been given to the railway company, and insisted that the steel company should buy the rolls from him as receiver, and should prove up its claim for existing indebtedness against the estate of the foundry company in his hands.

When the receiver insisted upon his refusal to permit this offset, the steel company agreed with the receiver that it would take the rolls from him and would submit to the court the question of the offset at issue between the parties. This was done, and the court below has decided that the rolls in question were, at the time the receiver was appointed, the property of the steel company, and that the steel company was entitled to the benefit of the offset claimed.

From this decision two appeals have been prosecuted to this court."

On p. 598 the Court say:

"*The bill filed by the Chicago Foundry Co. conferred no jurisdiction upon the Circuit Court to appoint a receiver. Courts do not sit for the purpose of conducting private business, about which there is no controversy.* *Wheeler* v. *Pullman Iron & Steel Co.*, 143 Ill. 197; *Wrigley* v. *The People*, 51 Ill. App. 51; 155 Ill. 497; *Gilbert* v. *Block*, 51 Ill. App. 516-521.

The order appointing the receiver gave him no control over these rolls, because there was then no controversy as to them. There is no reason for doubting that had the receiver not been appointed, these rolls would, in the ordinary course of business, have been delivered, as was intended, into the actual possession of the steel company.

The receiver, without right, intervened, and prevented a completion of a delivery begun by the foundry company.

Such being the case, by agreement with the receiver, appellee submitted to the court its right to these rolls. The court has found that the steel company is entitled to them.

It does not appear that the foundry company has ever objected to the carrying out of its agreement to deliver these rolls to appellee. *The receiver, holding without right or title, has objected.* We see no sufficient reason for interfering with the action of the Circuit Court; no injustice has been done by its decision. The receiver is not in a position to complain of it. *Stanton* v. *Andrews*, 18 Ill. App. 552; *Chicago Trust Co.* v. *Caldwell*, 58 Ill. App. 219.

The other appellants, said to be creditors of the foundry company, have intervened in a matter over which the court had no jurisdiction, save by the agreement made between the receiver and the steel company; that agreement did not provide that third parties might intervene or their claims be heard.

The Circuit Court, in respect to the controversy between the receiver and the steel company, by mere agreement between them, heard and decided that dispute, which was a matter as to which, under the circumstances, the general, mere contract creditors of the foundry company, had neither *jus in rem* or *jus in re*.

The judgment of the Circuit Court is affirmed."

From the fact that the Superior Court *could not* have *tertained jurisdiction* of the bill filed by plaintiff in District Court, very important conclusions neces-rily follow:

1. If the Superior Court had *jurisdiction* of the bill d herein and pursuant to which it attempted to ap-int receivers, *then the subject-matter of said bill sim-could not be the same as the subject-matter of the filed by plaintiff in the District Court.* In such case, controversy in each court would be *different*. There ld be no conflict of jurisdiction.

2. If, on the other hand, the Superior Court did not have *jurisdiction* of the bill filed therein, *then the receivers appointed by it had no standing whatsoever in the District Court.* And whether the District Court had jurisdiction or not, such receivers cannot complain of the refusal of the District Court to turn over to them the property in its possession.

We wish to emphasize at this point that the Illinois courts, both Appellate and Supreme, expressly hold that the local chancery courts have no jurisdiction of conservation proceedings. *The District Court's jurisdiction of conservation proceedings is, therefore, necessarily exclusive. And since its jurisdiction of conservation proceedings is exclusive, it could in the exercise of such jurisdiction, lawfully seize property belonging to, and in the possession of, the Daniel Boone Woolen Mills, Inc., even though there was then pending in the Superior Court of Cook County a stockholder's bill as well as a motion for the appointment of a receiver.* A case precisely in point is that of

Moran v. *Sturges*, 154 U. S. 256.

In that case the facts were as follows:

> "On the *31st day of July*, 1891, proceedings were commenced in the Supreme Court of the State of New York for the voluntary *dissolution* of a Steam Tow Boat Company, a corporation organized under the laws of that State, *and an order was made on that day restraining creditors from bringing action and requiring all to show cause, on the 16th day of November, 1891*, before a referee, why the prayer of the petitioner should not be granted. *An order was made at the same time for the appointment of a receiver*, which required him to give bonds before entering on the duties of his office. *On the 1st of August, 1891, in the forenoon of that day, these orders were entered and the papers filed in the office of the clerk of the court.* On the *afternoon* of the

same day, which was Saturday, and on *Monday, August 3*, libels in admiralty were filed in the District Court of the United States for the Eastern District of New York to enforce maritime liens against six of the vessels of said Tow Boat Company's fleet. *On the 1st of August the marshals for the district seized and took into custody three of the six, and on the 3d of August did likewise with the other three. On the 4th of August* the receiver filed his official bond, duly approved, and entered upon the discharge of his duties. *On the same day he went to take possession of the six vessels and found them in the custody of the marshal.* Thereupon, on his motion, process issued against the several libellants, to bring them before the Supreme Court of the State, where, after hearing, they were enjoined from taking any further proceedings on their libels. This judgment of the Supreme Court being affirmed by the Court of Appeals, and the judgment of the latter court being remitted to the Supreme Court and entered there as its judgment, the libellants sued out a writ of error to this court."

The Court quoted with approval the following excerpt from *Buck* v. *Colbath*, 3 Wall. 334:

> "*It is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly.* In examining into the *exclusive* character of the *jurisdiction* of such cases, we must have regard to *the nature of the remedies*, the *character of the relief sought, and the identity of the parties in the different suits.*"

The Court then pointed out that the *District Court had exclusive admiralty jurisdiction* (pp. 276-282). On pp. 283 *et seq.* the Court say:

> "*We think it entirely clear that, as a state court is without jurisdiction to enforce maritime liens*, so

it is incapable of displacing them, and, therefore, though under the rule laid down in *Taylor* v. *Carryl*, the possession by the state court of property subject to such liens will not be disturbed, yet that court can only deal with the property subject thereto; and when its jurisdiction has determined the admiralty courts may proceed.

But upon the facts disclosed in this record, was the District Court required to stay its hand until the termination of the proceedings in the state court? It is admitted that the receiver never took actual possession of the vessels, and that he did not qualify until after the marshal had taken such possession under the libels; but it is said that, as his *appointment* was made on *July 31, before* the libels were filed, when his bond was executed, approved and filed in the office of the clerk of the court for Albany County, *his title to the property related back to the time of his appointment*, and that he had *constructive* possession as of that date, which *constructive possession* overreached the possession of the marshal.

Certain sections of the New York statutes (Rev. Stats. Part 3, c. 8, §§ 66, 67; Code Civ. Proc. 1891, App. 1167) provide that a receiver 'before entering on the duties of his appointment shall give such security to the people of the State, and in such penalty as the court shall direct'; and 'such receiver shall be vested with all the estate, real and personal, of such corporation from the time of his having filed the security hereinbefore required.'

The contention is not only that the title to these vessels vested in the receiver as of July 31, and that, in such a case as this, constructive is the equivalent of actual possession, but that although the receiver did not qualify until after the seizure by the marshal, he thereupon became constructively possessed of the vessels as of July 31, and the jurisdiction of the District Court was thereby ousted. But if jurisdiction had attached, it would not be defeated even by the withdrawal of the property for the purposes of the state court, and, moreover, the doctrine of

relation has no application. *As between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute. But where the jurisdiction is not concurrent and the subject matter in litigation in the one is not within the cognizance of the other,* which actual or even constructive possession may, for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, *yet where there is neither actual nor constructive possession there is no obstacle to proceeding, and action thus taken cannot be invalidated by relation.* That doctrine is resorted to only for the advancement of justice, and, under these state statutes, is adopted to defeat fraudulent, unwarranted and unjust dispositions of the debtor's property, and to accomplish just and equitable ends. *Herring* v. *N. Y., Lake Erie, etc. Railroad*, 105 N. Y. 340, 377.

At the time these libels were filed and the marshal seized the property, it had not been developed whether or when the receiver would or might give the security required and enter upon the discharge of his duties, and he had neither actual nor constructive possession.

The jurisdiction of the state court over the subject matter of the winding up of the corporation and the distribution of its assets did not embrace the disposition of the claims of the libellants upon these vessels, nor were they as holders of maritime liens represented by the attorney general when he assented to the order of July 31, as were creditors of that Schuyler Company were. The adjudication by that order may have so operated on the title in respect of the parties to that suit as to place the property constructively in the custody of the law as of that date, *but not as to all persons and for all purposes. Under the circumstances we are unable to accept the conclusion that simply by the institution of the winding up proceeding, property, subject to liens over*

which they could not exercise jurisdiction in invitum, was placed in such a situation in respect of liability to being ultimately brought within the custody of the court that the District Court could not obtain jurisdiction for the purpose of ascertaining and enforcing those liens in respect of which its jurisdiction was exclusive. It appears to us that the District Court violated no rule of comity nor any other rule in entertaining the libels.

The title and the right of possession as between the receiver and the creditors of the Schuyler Company may have vested as of July 31, *but this could not operate to divest a jurisdiction, not concurrent, to the exercise of which no actual impediment existed at the time it was invoked.* As has been seen, maritime liens are incumbrances placed on vessels by operation of law, and neither the death nor the insolvency of the owner can divest or extinguish them or transfer jurisdiction over them to courts for the settlement of the estates of decedents or insolvents, although for the purposes merely of such settlement these are the appropriate tribunals. In the orderly administration of justice the representatives of such estates should apply to the court which alone has cognizance to ascertain and enforce these exceptional interests in the thing itself, which accompany it wherever it goes and into whosoever hands it comes, and which cannot be displaced by the action of other courts *in invitum*."

In the case at bar the stockholder's bill in the Superior Court was filed on February *14*, 1915. The bill was brought against the *Daniel Boone Woolen Mills, Inc.*, and *its directors alone. Creditors were not made parties defendant; and if it was a mere minority stockholder's bill, then creditors would have had no standing in the Superior Court. And, of course, the United States Worsted Sales Company, a citizen of New York, could institute any proceedings it saw fit in the Federal Courts, or elsewhere.*

If, on the other hand, *the bill filed in the Superior Court was a mere conservation bill, then the Superior Court had no jurisdiction.* At any rate, *the Superior Court could not have taken jurisdiction of a bill such as was filed in the District Court.*

In the Superior Court *no receiver* was appointed *prior* to the *seizure* of the property in question by the *District Court* in a case of which the *District Court* had *exclusive* jurisdiction of the subject-matter. The decision of the Supreme Court in *Moran* v. *Sturges* turned upon the want of jurisdiction of the New York Court of admiralty causes. Inasmuch as there was not *concurrent jurisdiction;* inasmuch as the *subject-matter* of the controversy in the District Court was not the *same* as the subject-matter of the controversy in the State Court, it was properly held, that having first actually seized the vessels in question in a cause whereof it had exclusive jurisdiction, the District Court could retain such property, even though proceedings were first instituted in the State Court and a receiver had been actually appointed.

The New York statute with respect to the giving of bond by receivers is irrelevant, and was, it would seem, a mere moral make-weight.

In the case at bar the Superior Court did not undertake to appoint receivers until more than a week after the seizure of the property by the District Court. At the time of its seizure there was pending in the Superior Court a mere motion for the appointment of a receiver.

B.

That the subject-matter of the suit in the Superior Court is necessarily different from the subject-matter of the suit in the District Court has already been demonstrated as a matter of ineluctable logic, provided the Superior Court had jurisdiction at all. Since the Superior Court could not entertain jurisdiction of mere conservation proceedings such as were instituted by the United States Worsted Sales Company in the District Court, it necessarily follows that if the Superior Court had jurisdiction of the proceedings instituted in that court such proceedings could not be the same as the proceedings that were instituted in the District Court.

An examination of the original bill filed in the Superior Court on February 14, 1925, will show:

1. That it was brought by one Hurwitz against the Daniel Boone Woolen Mills, Inc., and that Hurwitz owned 100 shares of the capital stock of the said defendant.

2. That on or about November 14, 1924, the then directors and officers of said defendant were ousted.[1]

4. That about *February 12*, 1925, Byfield *re-*

[1] It is then alleged that such former officers had defrauded the public in the sale of stock in said defendant, but plaintiff does not allege when, where, from whom, or upon what representations he purchased his stock. Neither does he allege that he paid more than the shares purchased by him were worth. The foregoing allegations with respect to the fraud of *former* directors and officers are therefore irrelevant, especially in view of the fact that such persons are not made parties, and the further fact that no relief with respect to such matters is asked by plaintiff. No such allegations are contained in the bill filed in the District Court. In any aspect of the case, the allegations above mentioned are irrelevant, so far as the *character* of the bill filed in the Superior Court are concerned.

ported that he had caused an audit of the corporation's books to be made; that such audit showed a shrinkage of $3,146,101.88 in corporate assets between December 31, 1923 and February 2, 1925. That Byfield also reported that his investigation had disclosed that conditions were worse than he had expected to find them, and that after ten weeks of almost constant attention to the affairs of the corporation he was forced to admit that his original hope of being able to save the defendant corporation appeared to be impossible of realization; that *there was no limit to the involved situation;* that never before had a corporation been so thoroughly looted; that business was being carried on by means of the collection of accounts, which could not continue indefinitely, and that

> "with weekly pay rolls ranging from fifteen to twenty thousand dollars, large outlays in cash for woolens and other materials, rentals, taxes and interest to be paid *immediate action by the stockholders in the matter of financing was imperative*" (Tr. 51).

5. That Byfield and his associate officers and directors had taken no steps to recover the huge sums reported to have been converted by *former* officers and directors, and that

> "*the only course by which relief could be obtained is the immediate appointment of a receiver with ample power and direction to cause a thorough examination of all the acts and doings of those who have misapplied or misappropriated assets of the defendant corporation and to institute such legal or equitable procedure as may be necessary to secure a return to the corporation of such misappropriated property or the proceeds thereof*" (Tr. 51-2).

6. That one Oscar Gumbisky, a *former* director and officer, had published advertisements in the public press containing counter-charges against Byfield and his associates in their administration of the corporation's affairs, and that the good-will of the

corporation had suffered as a result of such charges and counter-charges (Tr. 52).

7. "That during the period from November 14th 1924, when Byfield and his associates took charge of the defendant company, and up to December 31st 1924, the defendant company sustained a loss of approximately $75,000.00, for which Byfield and his associates alone are responsible; that if the business of the company is continued under the present chaotic condition and inefficient management, with the credit of the company already shattered and practically destroyed, and no immediate assistance or protection afforded by the court, *the company will become insolvent; that if a receiver is appointed and a proper investigation made by him under the direction of the court, the money the receiver will recover from officers, directors, individuals, and corporations who have fraudulently, unlawfully and unjustly obtained portions of the assets of the company and improperly converted the same for their own use will be sufficient to discharge all liabilities of the company to rehabilitate its credit and to give it ample resources with which its good will will be restored and its financial standing re-established*" (Tr. 52-3).

8. That "*complainant and his associate stockholders have no remedy through the officers and directors for the redress of such injuries and the recovery of such losses, and their only remedy is this suit brought for the benefit of and on behalf of complainant and all other stockholders similarly situated*, and that in the interest of all concerned this court should issue its injunction or restraining order directed to the officers and directors of the company *restraining them from in any manner pledging, mortgaging, encumbering, or in any manner creating any lien upon any of the assets of the company until the further order of this court*, and that this court immediately appoint a receiver with ample power and authority *to institute a full investigation as to the assets, moneys, claims, accounts and transactions of the company and its officers, directors and agents since the company's incorporation, and that upon*

discovery of any misuse, misappropriation, diversion or unlawful transfer of the assets of the company, the receiver be authorized and directed to take all needful, legal or equitable procedure to require return to the corporation of its money, assets and property, and that said receiver be authorized and directed to report from time to time to the court and take such procedure as may be necessary to become fully possessed of all property and assets of the defendant company, *and that in the meantime the receiver be authorized and directed to continue the business of the company as a going concern and for that purpose to employ help and assistants, and direct and operate the company's business, and to employ help and assistants,* and direct and operate the company's business, and to employ experienced and capable attorneys, who, under his direction, will institute such legal or equitable proceedings from time to time as the court may direct; *that all steps of administration, management and procedure shall be taken and conducted under and pursuant to the orders of this court after full report of the condition of the affairs of the company, and that such other and further procedure may be taken as will preserve the interests of complainant and all stockholders and other persons interested in the affairs of said corporation."* (Tr. 54-5).

The plaintiff prayed for

"an accounting with all directors and officers and other persons who have had to do with the affairs of the corporation; that upon discovery of unlawful misuse, diversion or misappropriation of assets, the court order such complete and adequate procedure as will restore to the company the misapplied property and assets; *that when the company has been so repossessed of its assets, moneys and property unlawfully and fraudulently taken from it, the court direct a meeting of stockholders of the company at a date to be fixed by the court, upon due notice, as required by statute and the by laws of the company, when a new board of directors shall be chosen and shall meet and choose officers for the management of*

officers of the company, and that after such proceedure has been duly reported to the court, the receiver be directed to make his final report to the court, and upon approval thereof, be directed to turn over to such duly elected officers and directors all of the assets of the company so marshalled by said Receiver, and that complainant shall have such other and further relief in the premises as equity shall require and to the court shall seem meet;

"Complainant prays for a temporary restraining order and injunction against the *officers, directors, agents and attorneys of the company,* restraining them from making any conveyance, pledge or hypothecation of any character or description of the assets of the defendant company, or in any manner interfering with its business and affairs until the further order of this court; prayer for summons in chancery directed to the sheriff of Cook County, Illinois, to summon said Daniel Boone Woolen Mills, Inc., to appear on the first day of the next March term of the court, then and there to answer to this bill, etc., and prayer for general relief" (Tr. 54-5).

The *character* of the proceedings instituted by plaintiff is clear. Hurwitz sought to have:

(a) *The directors and officers restrained from pledging or creating a lien upon the corporate assets.*

(b) *An impartial investigation* made into conduct of the corporation's affairs by *former* officers and directors, *and legal action taken to recover any moneys lost by reason of their peculations or other wrongful acts.*

(c) The corporation's business managed by a receiver *until the main purposes of the bill, as set forth in the foregoing paragraph, should be accomplished;* and thereupon—

(d) *An election of directors and officers to receive the assets and to take over the direction and control of the corporate business.*

The bill filed by Hurwitz was *primarily* for the benefit of *stockholders only;* whereas the bill filed in the District Court was primarily for the benefit of *creditors.*

The bill filed by Hurwitz related solely to the course to be pursued with respect to *intra-corporate* matters. Its main purpose was to procure an investigation into the conduct of the corporate business by former directors and officers, and the institution of suits in behalf of the corporation against directors and officers guilty of tortious acts.

The bill filed in the District Court neither showed any such facts, nor sought any such relief.

Hurwitz did not seek a *dissolution* of the corporation. In his bill he sought to have the corporation's business *temporarily conducted with the view of its ultimate restoration to the proper corporate officers.* The bill filed in the *District Court* prayed that *all* the assets of the corporation *be sold, that the equities, rights and priorities of creditors be adjudicated, and that the proceeds of such sale be distributed among the creditors.* Hurwitz sought to insure the *existence* of the corporation. The bill filed in the District sought the *distribution of all its assets among creditors.*

Hurwitz sought to recover moneys from former directors and officers for the primary benefit of the corporation as such. The bill filed in the Federal Court was not predicated upon the wrongful acts of former directors, but asked that all assets of the corporation be conserved for the benefit of creditors to the full amount of their claims. Hurwitz sought to have the then *directors and officers* restrained from creating a lien upon the

property of the corporation. The bill filed in the District Court prayed for an injunction

> "restraining and enjoining *all persons* from *levying executions, attaching, intermeddling with or taking possession of any of the property of said defendant.*" (Tr. 9.)

Hurwitz complained of *past wrongs* by former directors and the supineness of their successors. The plaintiff in the District Court claimed money to be due and owing and based its right to relief upon *impending injuries*—the clamor of creditors, the welter of suits and the scramble for assets, if equity did not intervene.

Plaintiff in the Federal Court was concerned with the inability of the corporation to pay its creditors. Hurwitz's chief concern was the supineness of the then directors with respect to collecting money from their predecessors.

The proceedings in the District Court were typical conservation proceedings, whereas the bill in the Superior Court was a minority stockholders' bill, which involved a conflict among directors and stockholders with respect to the wholly internal affairs of the corporation. *Not an issue that could possibly be determined in the Superior Court was involved or could possibly be involved in the proceeding in the District Court.* The appointment of a receiver in either case would be merely *incidental* to the *ultimate relief* sought. And that each suit concerned the same corporation is of course irrelevant, otherwise a decree in a suit for divorce by a lawful wife against her husband could be set up as *res judicata* in an action by a third person against the husband for breach of promise or for the collection of money due on a promissory note.

It being clear that the controversy in the District Court between a simple contract creditor and the corporation was altogether different from the controversy in the Superior Court between a stockholder and the officers and directors of such corporation, let us ascertain what is the correct rule in the premises with respect to jurisdiction.

Unquestionably the best reasoned case in all the books on this subject is that of

Empire Trust Co. et al. v. *Brooks*, (C. C. A. 5th Cir.), 232 Fed. 641.

In that case the Court stated the facts as follows:

"The original bill in this cause was filed *July 31*, 1914 in the District Court of the United States for the Western District of Texas, by the appellant, the Empire Trust Company, as trustee under a mortgage, executed May 1, 1911, by the San Antonio Land & Irrigation Company, Limited, to it, against that and others of its subsidiary companies, praying for a foreclosure of the mortgage and the appointment of a receiver of the mortgaged property, pending final decree.

One Preston, a bondholder and stockholder of the San Antonio Land & Irrigation Company, had *previously*, but on the same day, filed a bill in the district court of Nexar county, Tex., the purpose of which was *the appointment of a receiver of the corporation, as an insolvent corporation under the statute of Texas, and, by an amendment, the marshalling of its assets and its liquidation under the Texas laws. The suit in the state court was filed and brought to the attention of the judge of that court some hours before the filing of the bill in the federal court, and the state court judge had prior thereto, made an order requiring the defendant corporation to show cause on August 24, 1914, why a receiver should not be appointed of the assets of the corporation.*

On *August 12*, 1914 the judge of the District Court of the United States for the Western District of

Texas appointed Floyd McGown receiver of the defendant corporation in the foreclosure suit, and he took possession of the assets of the corporation and continued in possession of them up to and after the time of the filing of the intervention of the appellee herein. On *August 31*, 1914, the district court of Baxard county, Tex., appointed the appellee, Sidney J. Brooks, as receiver of the defendant corporation in that suit, under the petition filed in that court by Preston.

On *September 23*, 1914, the state receiver, Brooks, applied to the judge of the District Court of the United States for the Western district of Texas for leave to intervene in the suit filed by the Empire Trust Company, as trustee, in that court, which leave was granted; *and appellee thereupon filed his intervention, asking that the receiver theretofore appointed in the foreclosure suit be directed to turn over the assets in his possession to the intervener, as receiver under the appointment of the state court.* This intervention came on for hearing in the District Court of the United States for the Western District of Texas on the 10th day of November, 1914, *and the District Court*, on that day, *entered into a decree in the intervention, directing the receiver McGowan, to turn over the property of the defendant corporation, in his possession as receiver, to the appellee, as receiver in the suit pending in the state court, and setting aside the previous order appointing McGown receiver in the foreclosure suit. It is from this decree that the present appeal is taken by the complainant and the receiver, McGown.* The appellee has submitted a motion to dismiss the appeal, upon the ground that the decree appealed from is not a final decree."

The opinion rendered by the court is altogether admirable for its fairness, dignity, lucidity and thoroughness. The learned writer said:

"The question presented on the merits is whether the court below properly directed its receiver to surrender the mortgaged property, of which he had taken possession, to the receiver appointed by the

district court of Bexar county, in the insolvency proceedings pending in that court. The record fails to show that the property had been delivered to the trustee under the mortgage by the defendant corporation prior to the institution of the suit in the state court by Preston. While the naked legal title to the real property was then in trustees for the defendant corporation, the record does not satisfactorily show that the mortgaged property was adversely held or possessed by such trustee or any one against the defendant corporation. Nor are we prepared to hold that the district court of Bexar county, Tex., was without jurisdiction to entertain the suit instituted by Preston therein and to appoint a receiver of the assets of the defendant corporation on his application. It is conceded that the suit in the state court was filed, and that an order, notice of which was afterwards served, was made by the judge of the state court, requiring the defendant to show cause why a receiver should not be appointed, before the filing of the foreclosure suit. *It may also be conceded that possession of the assets of the defendant corporation would have become necessary to the exercise of the jurisdiction of the state court, at least, as it was invoked under the amended petition, which prayed for the marshaling of assets and liens and a distribution of assets among all creditors, according to their priorities.* It is also true that mere irregularities in the process or procedure in the state court, which do not avail to show a want of jurisdiction, cannot be considered in the United States court.

"*At the time the District Court of the United States for the Western District of Texas appointed its receiver, and at the time the receiver qualified and took possession of the mortgage property, the district court of Nexar county had made no order appointing a receiver in the cause there pending. The Texas state court had neither actual nor constructive possession of the mortgaged property at that time. The seizure by the receiver in the foreclosure suit, subsequently filed in the federal court was therefore no interference with the possession of the state court or its receiver, since it then had*

none. The prior jurisdiction of the state court h
however, been invoked in a way that might th
after require the possession by the state court
the mortgaged property for the accomplishment
the relief prayed for in the suit there pending.
*question for determination is whether the fed
court must surrender its first acquired possessio
the state court, because the jurisdiction of the la
was first invoked in a manner which required
session of the res for its proper disposition.*

"The rule is stated by the Supreme Court in
case of *Wabash Railroad* v. *Adelbert College*,
U. S. 38-54, 28 Sup. Ct. 182, 187 (52 L. Ed. 379),
follows:

"'When a court of competent jurisdiction h
by appropriate proceedings, *taken property into
possession through its officers*, the property is the
by withdrawn from the jurisdiction of all ot
courts. The latter courts, though of concurrent ju
diction are without power to render any judgm
which invades or disturbs the possession of the pr
erty while it is in the custody of the court wh
has seized it. For the purpose of avoiding injust
which otherwise might result, a court during
continuance of its possession, as incident thereto
as ancillary to the suit in which the possession
acquired, has jurisdiction to hear and determine
questions respecting the title, the possession, or
control of the property. In the courts of the Uni
States this incidental and ancillary jurisdiction
ists, although in the subordinate suit there is
jurisdiction arising out of diversity of citizens
or the nature of the controversy. Those princip
are of general application, and not peculiar to
relations of the courts of the United States to
courts of the states. They are, however, of espe
importance with respect to the relations of th
courts which exercise independent jurisdiction
the same territory, often over the same proper
persons and controversies. They are not based up
any supposed superiority of one court over
others, but serve to prevent a conflict over the p
session of property, which would be unseemly
subversive of justice, and have been applied by t

court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states, and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the states of the Union.'

"In the case of *Palmer* v. *Texas*, 212 U. S. 118-129, 29 Sup. Ct. 230, 233 (53 L. Ed. 435), the rule is stated more broadly, as follows:

"'We think the law of this court is well established to be that *jurisdiction over the property was acquired by the state courts when the receiver was appointed, the judicial process served, and the receiver duly qualified*, although the • • • receiver had not taken actual possession of the property. This principle was recognized in *Farmers' Loan & Trust Co.* v. *Lake Street Electric Ry. Co.*, 177 U. S. 51, 61 (20 Sup. Ct. 564, 44 L. Ed. 667), in which this court said: "the possession of the *res* vests the court which has first acquired jurisdiction, with the power to hear and determine all controversies relating thereto, and, for the time being, disables other courts of co-ordinate jurisdiction from exercising like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdictions embrace the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, to administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of special importance in its application to federal and state courts.'"

"From these cases it appears that the rule may be invoked in two classes of cases: First, in cases where there has been a disturbance of the actual or constructive possession of the *res* in one court

by the officers of another court of concurrent jur
diction. *Property in the actual possession of a*
ceiver, appointed by one court, can in no event
disturbed by the action of a court of concurr
jurisdiction. It is equally true that property in
constructive possession of a receiver of one co
who has been appointed and qualified but has
reduced the property to his actual possession, c
not be taken from his custody or that of the co
appointing him by the action of any other court
concurrent jurisdiction. The rule is without exc
tion that the actual or constructive possession
one court through its receiver cannot be disturb
by another of concurrent jurisdiction. The sec
class of cases to be considered is that in wh
there is *no interference with the possession, eit*
actual or constructive, of one court by another co
of concurrent jurisdiction, but only an interfere
with the jurisdiction of one court by another of c
current jurisdiction by the taking possession by
latter of property, not in the possession actual
constructive of the former, but which may beco
necessary to the exercise of its jurisdiction in
progress of the cause pending before it. Of th
two classes, the Supreme Court said, in *Palmer*
Texas, supra:

"'Nor is this rule restricted in its application
cases where property has been actually seized un
judicial process before a second suit is institut
in another court, but it often applies as well wh
suits are brought to enforce liens against spec
property, to marshal assets, to administer trusts
liquidate insolvent estates, and in suits of a simi
nature, where, in the progress of the litigation,
court may be compelled to assume the possess
and control of the property to be affected.'

"*It seems clear that where the basis of the*
is an infringement of the jurisdiction of the co
and not an interference with its possession of pr
erty, the rule depends upon the existence of suc
conflict and is not absolute. The quoted langua
of the Supreme Court indicates that the rule, *wh*
there is no disturbance of possession, is one of li
ited and not of universal application. It is a r

of comity to be applied by the court asked to surrender its possession, only when it is shown that that court has interfered with the jurisdiction of the court asking the surrender. It was held to be merely a rule of comity by this court in the case of *Adams* v. *Mercantile Trust Co.*, 66 Fed. 617, 15 C. C. A. 1; a case in which there was a clear conflict of jurisdiction. *Where the issues in the two suits are the same, and their subject-matter substantially identical, comity and the orderly administration of justice, and the desire to avoid a conflict of jurisdiction, require of the court that last acquires jurisdiction, though it be the first to acquire possession of the property involved in the litigation, that it surrender such possession on application, to the court of concurrent jurisdiction which first acquired jurisdiction of the controversy.* This was the holding in *Palmer* v. *Texas*, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435; *Farmers' Loan Co.* v. *Lake Street Ry. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; *Adams* v. *Mercantile Trust Co.*, 66 Fed. 617, 15 C. C. A. 1. *In such cases, the court making the surrender abdicates its jurisdiction over the cause, as well as surrenders possession of the res.*

"However, *where the issues in the subsequent suit are different from those involved in the first suit, and the subject-matter is not identical, there can be no infringement of the jurisdiction of the court in which the first suit is pending, by reason of the institution of the second suit in a court of concurrent jurisdiction. The only identity between the two suits in that event is that they relate to the same property, and, this being true, there is no apparent reason why the court which first acquires possession of the property should surrender its possession and thereby defeat its own jurisdiction, a jurisdiction which does not infringe upon the prior jurisdiction of the court in which the first suit was brought.*

"*Where the purpose of both suits is the same, and the relief prayed for substantially identical, the prior jurisdiction of the first court should be respected.* In the case of *Palmer* v. *Texas*, *supra*, the suit in the

state court was an action by the state to forfeit the charter of the corporation and wind up its affairs. The suit in the United States court was an action by a stockholder to liquidate the corporation. Both were substantially alike in purpose. So, in the case *Farmers' Loan Co. v. Lake Street Ry. Co., supra, the suit in the federal court was an action to foreclose a mortgage and that in the state court sought to enjoin the foreclosure.* In the case of *Adams v. Mercantile Trust Co., supra, the trustee under the mortgage was made a party defendant in the suit in the state court, so that the same issues were there presented as were involved in the subsequent suit in the federal court.*

"*An examination of each of the authorities, in which the principle of surrender has been applied to cases in which there was no interference with possession, but only a claimed conflict of jurisdiction, we believe will show an indentity of issues and subject-matter between the two suits.* The case of *McKinney v. Kansas Natural Gas Co.* (D. C.) 209 Fed. 772, is an exception.

The principal is thus stated in Gluck & Becker on Receivers, pp. 67, 68 (2d. pp. 89-91):

"'The *decisive test* as expressed by the weight of authority, *is that, when the controversy in both actions is the same, the court first acquiring jurisdiction of the controversy will retain it, and it is not necessary that it should take actual possession through its receiver of the property to obtain exclusive jurisdiction. If,* however, *the controversy is not the same, there is no conflict of jurisdiction as to the question or cause, and the court which first acquires jurisdiction over the property by actual seizure through its receiver will enforce that jurisdiction, and assume the actual possession, to which it gives the right, and until the property is seized, no matter when the suit was commenced, the court does not have jurisdiction over the property, and another court of concurrent jurisdiction may appoint a receiver, and through him take possession of the property.*'

"In the case of *DeLaVergne Refrigerating Mach. Co.* v. *Palmetto Brewing Co.* (C. C.) 72 Fed. 579, 584, 585, applying this principle, Circuit Judge Simonton said:

" 'The Counsel who argued this case with equal ability and earnestness have treated it as threatening a conflict of jurisdiction. But, as has been said, it is a question of comity. *The jurisdiction of the court over the controversy made here is unquestionable. The jurisdiction of the state court over the controversy made there cannot be disputed.* The receiver of *this* court is in *actual peaceable possession. The receiver of the state court was appointed subsequent to his appointment, in proceedings antedating those in this court * * * In view, therefore, of the fact that the controversy in the suit in this court is entirely distinct from that in the state court, and that the scope and purpose of the proceedings in the state court are not those of the proceedings in this court, connected with the fact that the receiver heretofore appointed in the main cause is in actual, peaceable possession of the property, and that the complainant holds a legal lien on the property, entitling it to its possession through a receiver, the mortgagor being insolvent, and that this court has been asked by it not to exercise an act of discretion but to give effect to a right secured to it by the Constitution and laws of the United States, the prayer of the petition cannot be granted and it is so ordered.'*

"This was said of an application by a receiver, appointed by a state court in an action, *first brought* by a stockholder for the appointment of a receiver of the corporation, to have surrendered to him the property of the corporation, which was in the *possession of a receiver in a suit for the foreclosure of a mortgage subsequently brought.*

"In the case of *Moran* v. *Sturges*, 154 U. S. 256-283, 14 Sup. Ct. 1019, 1928 (38 L. Ed. 981), the Supreme Court said:

" 'The contention is not only that the title to these vessels vested in the receiver as of July 31st, and

that, in such a case as this, constructive is the equiv
alent of actual possession, but that, although th
receiver did not qualify until after the seizure b
the marshal, he thereupon became *constructivel*
possessed of the vessels as of July 31st, and th
jurisdiction of the District Court was thereb
ousted. But, if jurisdiction had attached, it woul
not be defeated, even by the withdrawal of the prop
erty for the purposes of the state court, *and, more
over, the doctrine of relation has no application.* A
between two courts of concurrent and co-ordinat
jurisdiction, having like jurisdiction over the sub
ject-matter in controversy, the court which first ob
tains jurisdiction is entitled to retain it withou
interference, and cannot be deprived of its right t
do so because it may not have first obtained physica
possession of the property in dispute. *But wher
the jurisdiction is not concurrent, and the subject
matter in litigation in the one is not within th
cognizance of the other,* while actual or even con
structive possession may, for the time being, an
in order to avoid unseemly collision, prevent th
one from disturbing such possession, *yet wher
there is neither actual nor constructive possessio
there is no obstacle to proceeding, and action tha
taken cannot be invalidated by relation.* That doc
trine is resorted to only for the advancement of jus
tice, and, under these state statutes, is adopted t
defeat fraudulent, unwarranted, and unjust dispos
tions of the debtor's property, and to accomplis
just and equitable ends. *Herring* v. *N. Y. Lake Eri
etc., Railroad*, 105 N. Y. 340, 377 (12 N. E. 763). *A
the time these libels were filed and the marshal seize
the property it had not been developed whether o
when the receiver would or might give the securit
required and enter upon the discharge of his dutie
and he had neither actual nor constructive posse
sion. The jurisdiction of the state court over th
subject-matter of the winding up of the corporatio
and the distribution of its assets did not embrace th
disposition of the claims of the libelants upon the
vessels, nor were they as holders of maritime lien
represented by the attorney general when he a
sented to the order of July 31st, as mere creditor

of the Schuyler Company were. The adjudication by that order may have so operated on the title *in respect of the parties to that suit* as to place the property constructively in the custody of the law as of that date, *but not as to all persons and for all purposes. Under the circumstances we are unable to accept the conclusion that simply by the institution of the winding up proceeding, property, subject to liens over which that court could not exercise jurisdiction in invitum, was placed in such a situation in respect of liability to being ultimately brought within the custody of the court that the District Court could not obtain jurisdiction for the purpose of ascertaining and enforcing those liens in respect to which its jurisdiction was exclusive.* It appears to us that the District Court violated no rule of comity nor any other rule in entertaining the libels.'

"It is true the case of *Moran* v. *Sturges* is to be distinguished from this case, in that in it the state court did not have the capacity to take jurisdiction of the enforcement of maritime liens which were the subject-matter involved in the suit in the federal court, whose jurisdiction thereof was paramount and exclusive, while in this case the Texas state court had the capacity to take jurisdiction of the action to foreclose a mortgage. *The Supreme Court, however, did not limit the rule of nonsurrender to cases in which the court, asking the surrender, was shown to have no capacity to take jurisdiction of the controversy, and in which the jurisdiction of the court in possession was exclusive and paramount. On the contrary, it was held to apply as well to cases in which both courts had capacity to take jurisdiction, in favor of the court which first actually obtained it.* On pages 283, 284 of 154 U. S., page 283 of 14 Sup. Ct. (38 L. Ed. 981), the court said:

"'*As between courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference.*'

"*The court again recognizes that the rule of nonsurrender applied in cases in which the court asking*

the surrender had not actually taken jurisdiction first, though clothed with the power to do so, as well as those in which it had no potential jurisdiction by declaring the rule applicable, both in cases 'where the jurisdiction is not concurrent' and in cases where 'the subject-matter in litigation in the one is not within the cognizance of the other.' Cognizance and the want of it may be actual as well as potential.
Again the Supreme Court said:

"'The jurisdiction of the state court over the subject-matter of the winding up of the corporation and the distribution of its assets did not embrace the disposition of the claims of the libelants upon these vessels, nor were they as holders of maritime liens represented by the Attorney General, when he assented to the order of July 31st, as mere creditors of the Schuyler Company were.'

"This language is more appropriate when applied to an absence of jurisdiction in fact than to an absence of jurisdiction in law. *The Supreme Court held that a court having possession of the res is entitled to retain it (1) as against any court which has no jurisdiction of the controversy pending about it, though such court first assumed to exercise jurisdiction; and (2) as against any court clothed with jurisdiction of the controversy, provided jurisdiction was first obtained by the court in possession of the res and asked to surrender it.*

"*In this case the federal court was first in possession of the res, and is asked to surrender its possession to the state court, a court whose general competency is conceded. The propriety of the surrender must therefore depend upon which court in fact first obtained jurisdiction of the subject-matter in controversy. Conflict of jurisdiction as to the subject-matter of the litigation does not mean merely that the two suits relate to the same physical property. Moran v. Sturges holds directly to the contrary. It means that the issues involved, relief prayed for, and parties to the two suits are so substantially alike that the lis pendens of the last brought is included in the first. Unless it can be said that the issues involved, the relief sought and*

the parties to the suit in the federal court were included substantially in the lis pendens of the prior suit in the state court, the jurisdiction of the former did not conflict with that of the latter. The subject-matter of the suit in the federal court exclusively related to the foreclosure of the appellant's mortgage. In the suit as originally brought in the state court the foreclosure of appellant's mortgage was not sought. The appellant, as trustee, and the bondholders, as such, were not made parties to it. There had then been no default that would authorize a foreclosure. The attitude of the suit in the state court in these respects remained unchanged until after foreclosure suit was filed in the federal court, and its receiver had been appointed and taken possession. In the absence of the mortgagee, the state court could only have dealt with the property covered by the mortgage subject to the lien of the mortgage. It could not have sold the mortgaged property free of liens, nor could it have foreclosed the lien of appellant's mortgage in that suit as it then stood.

"*Whatever may have been its power to acquire future jurisdiction of the foreclosure of the mortgage by amendment or intervention, it had not in fact done so, when the suit in the federal court was filed. It follows that the state court did not obtain jurisdiction of the subject-matter of the suit in the federal court; i. e., the foreclosure of the appellant's mortgage, by the filing of the suit in the state court, nor had it obtained it up to the time of the filing of the suit in the federal court. The federal court, consequently, first obtained jurisdiction of the subject-matter of the foreclosure of the mortgage. In doing so it did not come into conflict with any prior jurisdiction of the state court, for it had obtained none. The federal court also first acquired possession of the mortgaged property, and this possession was necessary to enable it to exercise its first-acquired jurisdiction to foreclose the mortgage.*

"We think the principle decided in the case of *Moran* v. *Sturges* properly applies to the facts of this case, though it be conceded that the district

court of Bexar county, Tex., was clothed with general jurisdiction of actions to foreclose mortgages. We also cite in support of the right of the court first acquiring *possession* of the *res* to maintain it, as against a court in which was pending a suit, first brought, *but relating to different issues*, and the objects of which would require it to take possession of the property during the progress of the suit, the cases of *Mercantile Trust Company* v. *M. K. & T. R. R. Co.* (C. C.) 48 Fed. 351; *Compton* v. *Jesup*, 68 Fed. 263, 15 C. C. A. 397; *State Trust Company* v. *National Land Imp. & Mfg. Co.* (C. C.) 72 Fed. 575. The case of *McKinney* v. *Kansas Natural Gas Co.* (D. C.) 209 Fed. 772, is opposed to this view.

"*It is with this second class of cases that we are concerned in this case, since there was no actual or constructive possession of the res in the state court, when the receiver of the federal court assumed possession of the mortgaged property. No receiver had at that time been appointed by the state court.* *Moran* v. *Sturges*, 154 U. S. 255 284, 14 Sup. Ct. 1019, 38 L. Ed. 981. The suit in the district court was instituted by a creditor and stockholder for the purpose of winding up the corporation and distributing its assets among its creditors as an insolvent corporation under the Texas statutes. No lien was sought to be enforced in it; the creditor, who was a bondholder, did not rely on his security, or seek to have enforced the lien of the mortgage. *The trustee under the mortgage was not made a party to the proceeding in the state court.* After the suit was brought, other holders of bonds and of stock intervened, as well as certain riparian claimants; but the nature and the purposes of the suit were in no wise changed. The foreclosure of the mortgage lien was never within the *lis pendens* of the state court suit. It was always and exclusively a liquidation proceeding by general creditors under the Texas statutes.

"The suit in the District Court of the United States for the Western District of Texas sought exclusively the foreclosure of a mortgage which was a first lien on the property of the corporation. The plaintiff was the trustee under the mortgage, the defendants were the mortgagor and certain subsidiary

corporations. The record shows quite conclusively that there was no probable equity over and above the mortgage indebtedness, and that the bondholders were primarily, if not exclusively, interested in the administration of the property. They had a prior claim over the unsecured creditors represented in the state insolvency proceedings, a claim which was not within the issues or subject-matter of that proceeding. Though some of the creditors in the state suit happened to be bondholders, they were not there insisting on their security or seeking to enforce it, and so were in the attitude of unsecured creditors.

"Under the circumstances, we conclude that the issues, the subject-matter, and the relief prayed for in the two suits are so different that it cannot be said there is a conflict of jurisdiction between them. If both suits had sought the winding up of the corporation because of its insolvency, or both had sought to enforce a mortgage lien on the property of the corporation, such a conflict of jurisdiction would have existed, and possession would have been rightly surrendered to the court in which the first suit was instituted.

"Neither the rule that, in case of conflict of jurisdiction, possession should be surrendered to the court first acquiring jurisdiction of the controversy, where it is or may be required for the purposes of the litigation during its progress, nor the rule against the disturbance of the court's possession has, therefore, any application in this case.

"In addition, in this case, the persons having the prior right and probably the exclusive interest in the property, which is the subject-matter of the litigation, are the bondholders who are represented by the plaintiff in the suit in the federal court. Ordinarily the parties chiefly interested in the administration of the property should be permitted to select the forum. *It is asked, however, that the court in which the prior lien is sought to be enforced, which has full jurisdiction to enforce it, and whose receiver is in peaceable possession of the mortgaged property, acquired by him when the state court had*

neither actual nor constructive possession of it, s
render the possession to a receiver, appointed by t
state court, in a suit instituted by creditors, who
claims are entitled to payment only after those
the bondholders are fully satisfied, when to do
would defeat the jurisdiction of the federal court
foreclose the mortgage, which the plaintiff has rig
fully invoked, and remit the plaintiff, along with t
res, to the state court, to apply for leave to interve
in the insolvency proceedings to assert the lien of
mortgage in a proceeding, which had not taken co
nizance thereof.

"It appears to us that no rule of comity requir
the District Court to surrender its possession und
the circumstances indicated, if it be conceded that
case, in which there is no conflict of jurisdiction b
tween the state and federal courts, and no int
ference by the federal court with the possession, a
tual or constructive, of the state court, is one
which the rule of comity applies at all.

"The decree appealed from is reversed, and t
cause is remanded, with instructions to set aside t
order of November 10, 1914, reinstating the order
August 1, 1914, and thereafter proceed in the ca
as equity and good conscience may require."

The foregoing opinion contains all the law and t
prophets, so far as the questions involved in the case
bar are concerned. It exhausts the entire subject. S
also the cases cited on p. 5, *supra*.

The case of

Havner v. *Hegnes*, (C. C. A. 8th Cir.) 269 Fe
537,

is remarkable for the hopeless confusion of ideas it
mistakably evidences. In that case the facts were
follows:

On April 26, 1920, Hegnes (a citizen of South Dakot
filed a complaint in the United States District Court f

the Northern District of Iowa charging that the Midland Packing Company (an Iowa corporation) had fraudulently obtained from plaintiff and others promissory notes aggregating some $3,000,000. in payment of shares of capital stock of said defendant; that all the capital stock of the corporate defendant had been sold pursuant to the same fraudulent scheme; that the corporation (which was controlled by the perpetrators of the fraud) was threatening to dispose of the notes to innocent purchasers; that it was either insolvent or in imminent danger of insolvency; that the officers of the defendant had procured the promissory notes with the intention of converting the proceeds thereof to their own use and without the intention of carrying on the business of manufacturing and selling packinghouse products.

The plaintiff brought his action not only in his own behalf "but in behalf of all other creditors and stockholders of said defendant similarly situated," (p. 538), and before the appointment of the receiver 32 citizens of South Dakota, Iowa and Nebraska filed intervening petitions and asked to join with plaintiff in the relief prayed for, which was:

> (a) rescission of contracts for purchase of shares of stock;
>
> (b) cancellation of notes given pursuant to said contract;
>
> (c) judgment on such notes as were transferred to other persons by defendant;
>
> (d) an injunction restraining defendant from the sale of any notes not theretofore disposed of;
>
> (e) order requiring defendant to show cause why a receiver should not be appointed to take exclusive charge of the property and assets of the defendant;
>
> (f) general relief. (p. 539)

On the same day (April 26, 1920) the Federal C issued a subpoena and entered an order requiring defendant to show cause on May 25, 1920, why a rece should not be appoitned as prayed.*

On May 7, 1920, Havner, Attorney General of the S of Iowa, instituted an action in a State (Iowa) Court the dissolution of the defendant and the winding u its affairs on account of alleged violations of local l It was alleegd that the immediate appointment of a t porary receiver was necessary, and the Attorney Gen prayed that a permanent receiver be appointed as s as possible. (p. 539)

On the same day (May 7, 1920) the State Court pointed a temporary receiver, who took actual cust and control of the property and assets of the defend (529-40).

Thereafter, such proceedings were had in the Fed Court as resulted in an order enjoining Havner f proceeding further in the State Court, and directing State Court's receiver to turn over the property and sets of the defendant to the Federal Court's receiv who were appointed on May 25, 1920. Havner and oth appealed from the order in question (p. 540).

The Circuit Court of Appeals correctly stated that question presented to it for decision was:

> "Who is entitled to the possession of the pr erty and assets of the defendant, the receiver pointed by the State Court or the receivers pointed by the Federal Court?" (p. 540).

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*Service was had upon Stokes the general auditor of the defen on April 27, 1920, the only officer that could then be found. On 8, 1920, one Ballinger, the vice-president, was also served (pp. 539, The matter of service is immaterial under the decisions.

The Court then said:

> "The appeal *does not* present a case where the controversy or the parties are the same in different actions pending in Courts of concurrent jurisdiction." (p. 540).

And again on p. 541:

> "*The issues and parties not being the same in the present action and the one pending in the State Court*, the rule last above stated applies."

Where the *controversy* pending in two Courts *is not the same*, then there is *no conflict of jurisdiction;* and the rule as stated by this Court is, that the court that first *actually seizes* property of a defendant will hold the property until its jurisdiction of the *controversy* before such Court is exhausted. *Upon the admitted facts heretofore stated the State Court of Iowa was entitled to hold the defendant's property* because such court first *actually seized* said property. Where the *controversy* pending in two courts is *the same*, the court that first acquires jurisdiction of the *controversy* will retain jurisdiction (of the *controversy*) to the exclusion of the other court, regardless of whether the other court first seized the *res* in the exercise of *jurisdiction* (*over the same controversy*) subsequently acquired. In a word, where the controversy is *the same*, the *res* follows jurisdiction of the *controversy*. And since in conflicts of jurisdiction (over the *same controversy*) one court must necessarily yield, when it yields up the *controversy*, it necessarily surrenders possession of any *property* which it had seized in the exercise of its supposed jurisdiction of the identical *controversy* of which another court had *first obtained jurisdiction*.

The Circuit Court of Appeals *intercalated* into the

true rule (where the *controversy* is not the same) t
fiction of *constructive* possession of property:

> "Where the controversy, however, is not the sam
> the issues being different in one suit from those i
> volved in another, and the subject-matter is n
> identical, there can be no infringement of jurisd
> tion as between the courts maintaining cognizan
> of the cases. This rule rests on the ground that
> such a case there is no conflict of jurisdiction as
> the question or cause. In such cases the court wh
> first acquires the actual (or *constructive*) possessi
> of property is entitled to retain the same. *Emp*
> *Trust Co.* v. *Brooks, supra; De La Vergne Ref*
> *Mach. Co.* v. *Palmetto Brewing Co.* (C. C.) 72 F
> 579; Gluck & Becker on Receivers, *supra; Kaud*
> v. *First Trust & Savings Bank, supra;* Corpus Jur
> vol. 15, p. 1169, where cases almost without numb
> are cited in support of the rule stated." (p. 540)

The subsequent reasoning of the court is inde
curious, as well as patently fallacious.

> "The question is, therefore: Which court, t
> federal or state, first acquired actual or construct
> possession of the property of defendant? It is c
> ceded that the latter first acquired actual poss
> sion; but did the federal court, at the time the
> ceiver appointed by the state court took actual p
> session, have lawful constructive possession of t
> same? If it did, the receiver appointed by the st
> court had no authority to take possession. T
> solution of the question involved requires a cons
> eration of the exact status of the case pending in t
> federal court, and, before considering that stat
> *it is well to bear in mind, that, assuming the fede*
> *court to have jurisdiction of the question as*
> *whether a receiver should be appointed or not,*
> mere erroneous conclusion reached in consideri
> that question can effect the validity of its action
> far as the question before the court is concerne
> (p. 541)

And again:

> "The complaint filed by the plaintiff certainly *authorized the federal court*, it having jurisdiction of the parties and subject-matter, *to enter upon an inquiry as to whether a receiver should be appointed or not*. In entering upon such inquiry it did not seem to it that a heroic remedy was necessary; but it proceeded in an orderly manner, and at once upon the filing of the complaint issued an order wherein the defendant was required to show cause why a receiver should not be appointed. **This proceeding to appoint a receiver was of the same nature, in regard to the same issues, and for the same purpose, as the proceeding in the state court to appoint a receiver.** The federal court had a right to proceed in the way it did. It had the question of receiver or no receiver before it. It ought not to be the law that in such circumstances another court of concurrent jurisdiction should be able, on account of immediate necessity, to so interfere with the process of the federal court as to render its final conclusion as to the appointment of a receiver of no avail to the parties before it. If the action on the part of the state court as shown by the present record can be sustained, then any court that is proceeding according to due process of law and in an orderly manner may have its action defeated by a court which is more expeditious." (p. 542)

The fallacy of the Court's reasoning is at last clear.

In the same opinion it is stated:

> "The appeal *does not* present a case where the controversy or the parties are the same in different actions pending in courts of concurrent jurisdiction." (p. 540) And see also top of p. 541.

> "This proceeding to appoint a receiver was of the *same nature, in regard to the same issues, and for the same purpose*, as the proceeding in the State Court to appoint a receiver." (p. 542)

If the Court meant that in both cases each party sought to have the defendant corporation dissolved and its assets distributed among its creditors and stockholders,

then, of course, the statement made on p. 542 would be correct, and the statements made on pp. 540 and 541 would be incorrect. If the allegations of the plaintiff's bill filed in the Federal Court were true, then the distribution of the corporation's assets among creditors was inevitable. The corporation was a mere shell. All its capital stock had been fraudulently sold for fraudulent purposes.

But, apparently, the Court was under the misapprehension that the mere fact that in each case the appointment of a receiver was asked characterized the proceedings.[1] Of course, the fact that a *receiver* is asked in two suits does not make the *controversies the same. For instance, a court may be asked to appoint a receiver in a suit to foreclose a mortgage, or in partition proceedings, or in bankrupt proceedings, or in divorce proceedings, or on a creditor's bill, or in ejectment proceedings* and in many other proceedings of the most *disparate* nature. Yet such fact would not *characterize the nature of the proceedings*, nor render the *controversies* in two suits of a different nature the same. A receivership is

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[1] On p. 543 the Court say:

"The facts in the present case bring it far within the rule established by the cases of *Farmers' Loan & Trust Co. v. Lake St. Elevated Co., supra*, and *Mound City Co. v. Castleman, supra*, for the reason that immediately upon filing the complaint a show-cause order was issued requiring defendant to show cause why a receiver should not be appointed. The court went so far in the case referred to as to apply the rule—

'In suits of a *similar nature*, where in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected.'"

The case first above cited, arose in this circuit, and involved a conflict of jurisdiction *over identical issues*. (177 U. S. 51.)

a purely *ancillary* remedy—a mere incident to the ultimate relief sought.

The opinion of the Circuit Court of Appeals is finally rested upon the ground that the District Court first obtained "*constructive possession*" of the property and assets of the defendant corporation (p. 543).

If the controversy was the same, then the result was correct, even if the reasoning was fallacious. *If the controversy was not the same, then the result was clearly incorrect.* Despite the opinion of the learned Circuit Court of Appeals, *we do not believe that two proceedings in independent courts can be both the same and not the same.*[1]

The case of

> *McKinney* v. *Landon* (C. C. A. 8th Cir.) 209 Fed. 300,

is by the same court, and needs no comment. The opinion in the case of

> *Empire Trust Co.* v. *Brooks* (C. C. A. 5th Cir.) 232 Fed. 641,

set forth on pp. 37-52, *supra*, fully states the reasons for the correct rule, which this Court has since expressly adopted. It was always implicit in previous decisions, when read in the light of the particular facts before the court in each case and firmly established principles.

The theory of the petition filed in the District Court

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[1] The Court also cited the case of *Mound City* v. *Castleman*, (C. C. A. 8th Cir.), 187 Fed. 924, but that was a case where the suits were between the same parties or their privies, and involved a question of *res judicata*. Moreover, the whole proceedings in the C. C. A. were moot.

was that the Superior Court obtained *constructive pos*
session of the defendant's property. Here the sam
claim is made under a different name. It is said tha
there was an "arrest of property." The claim is dem
onstrably absurd.

Take, for instance, the case where the same contro
versy is pending in two courts. Assume that a bill i
first filed in, and that process is first issued by, court A
that thereafter another bill presenting the *same contro*
versy is filed in court B, which seizes the property in
volved before the appointment of receivers by court A
All talk of constructive possession or arrest of propert
is irrelevant, for the reason that *the prior filing of th*
bill in, and the issuance of process by, court A veste
such court with prior jurisdiction of the controversy. I
such cases there is a *conflict of jurisdiction* over the con
troversy; and prior jurisdiction is necessarily either ob
tained or not obtained prior to the *appointment of receiv*
ers, which is merely an order entered in a cause concern
ing a controversy of which the court has jurisdiction
either prior or subsequent.

Such talk is equally irrelevant where the controvers
is not the same. This Court expressly so held in th
case of

Moran v. *Sturges*, 154 U. S. 256,

set forth on pp. 24-28, *supra*. In that case the bill wa
first filed in the State court, which on the same day ap
pointed a receiver, but required him to give bond be
fore entering upon the discharge of his duties. There
after and before the receiver gave bond a bill presentin
a *different controversy* was filed in the Federal Cour
which first seized the property involved. The State cou

receiver thereafter gave bond, and demanded the possession of the property. It was argued that the giving of the bond related back to the filing of the bill, and that the State court receiver had *constructive* possession of the property from the time of the filing of the bill. But it was held that the argument was unsound.

The argument was unsound, because the State court either acquired or failed to acquire prior jurisdiction upon the filing of the bill and the issuance of process. Investigation disclosed the fact that the *controversies* pending in the two courts *were not the same*.

The State court acquired jurisdiction of the *controversy pending in that court* upon the filing of the bill, etc., and so the theory of relation was as unnecessary as it was futile. The Federal court, however, *acquired jurisdiction of another and different controversy;* and inasmuch as it had first seized the property involved in the two different controversies, its prior possession could not be defeated by any theory of relation.

Moreover, in that case the State court could not entertain admiralty jurisdiction, just as in the case at bar, the Superior Court could not acquire jurisdiction of conservation proceedings (pp. 13-24, *supra*). Where the controversies pending in two courts are not the same, the court that first seizes the property involved in the exercise of jurisdiction of the controversy before it, may retain possession of the property, *regardless of when the other court acquired jurisdiction* of the *different* controversy before such court.

III.

The peculiar facts in the case at bar differentiate it from the cases decided by the Circuit Court of Appeals for the Eighth Circuit, which are relied upon by the petitioners as creating a conflict of opinion.

The case at bar is ruled by Moran v. Sturges, 154 U. S. 256.

In the case of

Ward v. *Foulkrod* (C. C. A. 3rd Cir.), 264 Fed. 627,

—relied on by petitioners as giving rise to a conflict of opinion among the circuit courts of appeals—it was expressly held that the *same controversy* had been presented to the state court and the federal court (p. 633).

In the case of

O'Neil v. *Welch*, (C. C. A. 3rd Cir.), 245 Fed. 261,

the controversy presented to the two courts was in fact the same (5th syllabus).

The decisions of the Circuit Court of Appeals for the Eighth Circuit are not only contrary to the rule repeatedly recognized by this Court, but are so manifestly erroneous as to be unable to give rise to a substantial conflict of opinion.

Moreover, the peculiar facts of this case are absolutely ruled by the case of

Moran v. *Sturges*, 154 U. S. 256.

The Superior Court could not have entertained jurisdiction of conservation proceedings, just as the New

York court could have entained jurisdiction of admiralty proceedings. The principle involved in both cases is identical. The decision in *Moran* v. *Sturges*, is therefore controlling.

With respect to the matters determined in that case there is no conflict of opinion among subordinate federal courts. Even if there were such a conflict, this court could only repeat what was well said in *Moran* v. *Sturges*.

No occasion for the issuance of the writ of certiorari exists.

IV.

The petition for the surrender of the property does not predicate the alleged right of the "receivers" appointed by the Superior Court to the possession of such property upon section 37 of the Judicial Code.

The petition does not state sufficient facts to make out a case under section 37.

The proof shows that in any event section 37 is inapplicable to the facts in the case at bar.

An examination of the petition filed in the District Court for the surrender of the property held by it to the so-called "receivers" appointed by the Superior Court, will show:

1. That the jurisdiction of the Federal Court was not challenged, *except as it related to jurisdiction of the property.* In other words the jurisdiction of the District Court was attacked only upon the *hypothesis that the Superior Court first obtained exclusive jurisdiction of the property of the defendant corporation.* The District Court's jurisdiction was not challenged under Section 37 of the Judicial Code.

2. That even if it was the purpose of the petitioners to rely upon Section 37 of the Judicial Code, the allegations of the petition are wholly inadequate and fail to make out a case under said section.

Section 37 of the Judicial Code is set forth in the margin.*

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* "Sec. 37. *If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.*"

5 Fed. Stats. Annot. (2nd Ed.) pp. 288-9.

The petition filed in the District Court by the "receivers" appointed by the State alleged the institution of the proceedings in the Superior Court on *February 16*, 1925, the nature thereof, the motion for the appointment of a receiver, the alleged colloquy between the Superior Court, and counsel for the plaintiff and the defendant, the continuance of the motion, the subsequent filing of a bill in the District Court on *February 18*, 1925, the confession of its allegations, the consent to the appointment of a receiver by the defendant, and the nature of such proceedings (Tr. 16-21).

The petitioners then ask for what? Do they ask that the District Court *dismiss* the suit as required in proper cases by Section 37 of the Judicial Code? No, they do not. They ask merely for the entry of an order directing the receiver appointed by the District Court to surrender the property in his possession to the petitioners (Tr. 16). As a matter of fact, they *recognize* and *invoke* the jurisdiction of the District Court by also asking, *but not in the alternative*, for an order appointing their counsel as counsel for the Daniel Boone Woolen Mills, Inc., "to the end that said State Court Receivers may and shall control and dictate the acts and doings of said" company "as defendant in the above entitled cause." (Tr. 16-17).

The District Court *was not asked to dismiss the suit* pursuant to the provisions of Section 37 of the Judicial Code, but the jurisdiction of said Court was challenged upon the ground—upon the *sole* ground—that the Superior Court had constructive possession of the property of the defendant corporation at all times after *February 16, 1925*. The two closing paragraphs of the petition

set forth in the margin clearly show that such is th
fact.[32]

The two paragraphs amount to the same thing, excep
for the reference in the latter paragraph to the lack o
jurisdiction "*on the face of the bill*," which will be dis
cussed later. It should also be observed that the tw
paragraphs are mere *legal conclusions* based upon th
facts theretofore pleaded. Also, that the petitioners d
not assert that the District Court had no jurisdiction o
the *controversy*, but only that the said court was withou
jurisdiction to *appoint a receiver*.

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[32] "Said State Court Receivers show that as they are advised b
counsel, and therefore charge the fact to be, by the filing of sai
bill of complaint in said Superior Court, the appearance therein a
aforesaid of said Daniel Boone Woolen Mills, Inc., *and the entr*
as aforesaid on February 16, 1925 of the motion of said Hurwit
for the appointment of a receiver in said Superior Court of Coo
County acquired *jurisdiction to determine the question of th*
propriety of the appointment of such receiver and, should it seem
fit to said last mentioned court, to appoint a receiver or receivers
of said Daniel Boone Woolen Mills, Inc., with the powers and
duties conferred upon said State Court Receivers by said order o
February 28, 1925; and *by reason of the premises said Superio*
Court of Cook County acquired, on *February 16, 1925*, *constructi*
tive possession of all of the assets, property and books of the said
Daniel Boone Woolen Mills, Inc., and the prior right and jurisdic
tion, as against any court proceeding in a cause thereafter insti
tuted to take actual possession of the books, property and account
of said Daniel Boone Woolen Mills, Inc., by and through the ap
pointment of a receiver or receivers of and for said last men
tioned company, its property, assets and books.

Said State Court Receivers Further Show that as they are ad
vised by counsel and believe and therefore charge and request
fully submit, by reason of the premises and on the face of th
bill of complaint filed herein in this United States District
Court for the Northern District of Illinois, said United States Dis
trict Court is *and was at all times from and after February 16*
1925, without jurisdiction, power or right to *appoint a receiver o*
said Daniel Boone Woolen Mills, Inc., or of any of its property
assets or records." (Tr. 21).

But it may be urged that the paragraph set forth in the margin[11] proves that the petitioners did rely upon Section 37 of the Judicial Code. Our answers to such contention are as follows:

1. If they did rely upon section 37, then why did not they ask the District Court to "*dismiss* the suit"? Why did not they ask for *the relief* granted by the section, if they were proceeding under it? That is what any lawyer would do. That they were not proceeding under said section is proved not only by their failure to ask the relief afforded by it, but by their asking the District Court to appoint their own attorneys as counsel for the corporation defendant,—doubtless in order that the previous confession and consent might be withdrawn, and that the jurisdiction of the District Court over the *suit* might *then* be attacked on the ground that a simple contract creditor has no standing in a court of equity when objection to jurisdiction is made by the defendant.

2. The petitioners in the paragraph just *preceding* the one last quoted and now under discussion had alleged the institution of the suit in the Federal Court by the United States Worsted Sales Co., the

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[11] "As said State Court Receivers are informed and believe, and therefore charge the fact to be, said Daniel Boone Woolen Mills, Inc., *voluntarily furnished* said United States Worsted Sales Co., in advance of the filing of said last mentioned bill of compliant, and after the entry and continuance, as aforesaid, of said motion in the Superior Court of Cook County, Illinois, *for the appointment of a receiver, the facts or substantially all of the facts alleged in said bill of complaint in said United States District Court, and thereby, and otherwise*, in ways and by means unknown to said State Court Receivers, *brought about the filing of said last mentioned bill, and thereafter voluntarily appeared as aforesaid*, in said United States District Court, by its President, Joseph Byfield, and said Cowan and said Barrett and Barrett (all of whom signed said written admission of facts), *and consented as aforesaid, to the appointment of such receiver*, as aforesaid, by said United States District Court *for the purpose, and with the intention of thereby defeating, avoiding and evading the jurisdiction of said Superior Court of Cook County, Illinois*, and thereby depriving the complainant in said original bill in the said Superior Court and others in the same class, of all remedy in the premises and to this end, none of the parties to said case and proceeding in said United States District Court gave any notice of said case or proceedings in said last mentioned court to said Harry Hurwitz, or to said Michael Gross." (Tr. 19-20)

confession and consent by the defendant, and the appointment of a receiver by the District Court (Tr. 19). The paragraph last *quoted* proceeds upon three propositions, neither of which is sufficient under Section 37 of the Judicial Code.

> (1) That the Daniel Boone Woolen Mills Inc., voluntarily furnished the plaintiff in the District Court "substantially all of the *facts* alleged in said bill of complaint" and "otherwise brought about the filing of" said bill.
>
> (2) That it confessed the bill and consented to the appointment of a receiver.
>
> (3) That it so confessed and consented *not for the purpose of "creating a case cognizable* * * * *under"* Section 37 of the Judicial Code, *but "for the purpose*, and with the intention of *thereby defeating*, avoiding and evading the jurisdiction of said **Superior Court of Cook County."**

Proposition No. 2 may be dismissed without further consideration, inasmuch as all conservation proceedings in the Federal Courts are based upon the confession and consent (or the failure to object, which is the same thing) of the defendant. Otherwise, there would be no jurisdiction of a bill filed by a simple contract creditor.

Proposition No. 3 is also inadequate. The purpose of Section 37 of the Judicial Code is to protect the *District Courts* from hearing causes not properly cognizable by them. But inasmuch as conservation proceedings are properly cognizable by District Courts *upon the confession and consent of the defendant*, the motive for confessing and consenting is immaterial. The petitioners do not allege:

> a. That the facts stated in the bill were not true; or
>
> b. That the persons signing said documents were not officers of the corporation; or

c. That the confession and consent were for the purpose of deceiving the *District Court*, or of foisting upon it a suit or controversy not properly within its jurisdiction.

Proposition No. 1 is also wholly inadequate. The petitioners do not allege that plaintiff's claim was not *bona fide*, or that any property or claim was transferred to plaintiff in order to procure the necessary diversity of citizenship, or that the facts alleged in plaintiff's bill were not true, or that there was any agreement that the defendant should control the proceedings in the District Court, or that the defendant should pay the costs or expenses of the litigation, or that *plaintiff* was a citizen of the State of Illinois, or that *plaintiff* colluded with the defendant.

Neither do the petitioners allege or set forth the means whereby the defendant "otherwise brought about" the filing of the bill by plaintiff. For all the *petition* shows, the defendant may have deceived the plaintiff, who may have acted in the best of faith, or may have frightened the plaintiff by exaggerating the financial distress of the defendant, which resulted in plaintiff's instituting the suit in good faith. *Or the defendant may have frankly informed plaintiff of the facts*, and thus have *brought about* the filing of the bill *because both plaintiff and defendant believed that their common interest, as well as the interests of all other creditors, would be best served thereby.*

It is not alleged that *plaintiff* had knowledge of the pendency of the proceedings in the Superior Court. *But even if it were so alleged, plaintiff's preference for the District Court—and the defendant's too—is irrelevant, so long as plaintiff was not a citizen of Illinois, had a*

bona fide claim, and the facts alleged in the petition were true. These essential matters are not attacked in the petition.

The allegation in the paragraph heretofore quoted that "by reason of the premises and on the *face of the bill*" is manifestly untenable.

Petitioners did not originally rely upon Section 37 of the Judicial Code. They relied upon the *untenable assumption that the Superior Court obtained constructive jurisdiction of the defendant's property on February 16, 1925, and the efforts of the defendant to defeat that supposed jurisdiction. These efforts consisted of admitting allegations which it could not truthfully deny, and of consenting to the appointment of a receiver which it had a perfect right to do. Petitioners do not impugn the motives, claim, citizenship, or conduct of, or the facts alleged by, the plaintiff. They do not allege anything that the defendant did except what it had a right to do. They make no attempt to show in their petition that any deceit, fraud or imposition was practiced upon the District Court.*

It is clear that in any aspect of the matter the petition fails to make out a case under Section 37 of the Judicial Code. The petition filed by the State Court "receivers" is subject to the same rules as any other pleading. *It is elementary that proof without pleading or pleading without proof is inadequate. They must correspond and be legally sufficient.* However, even if the proof be looked to, the appellants are in no better position.

B.

In the first place, the District Court heard and passed on all the evidence. The Court's decision therefore resolved all disputed questions of fact, if any, against the petitioners.

When the facts are in dispute, absence of jurisdiction must "appear to the satisfaction of the said district court". Necessarily, the whole matter rests in the sound discretion—*legal*, of course—of the District Court. And wherever jurisdiction appears, *prima facie*, on the face of the record, the person that challenges the actual jurisdiction of the court must prove the absence of jurisdiction by the clearest and most convincing evidence. In

Barry v. *Edmunds*, 116 U. S. 550,

this Court held:

> "A suit cannot properly be dismissed by a Circuit Court of the United States as not substantially involving a controversy within the jurisdiction of the court, unless the facts when made to appear on the record, create a legal certainty of that conclusion."

See also

Wetmore v. *Rymer*, 169 U. S. 115.

Hill v. *Walker* (C. C. A. 8th Cir.), 167 Fed. 241.

Now let us examine the evidence.

First, as to the *undisputed* facts. The record shows:

1. That plaintiff in the District Court was a citizen of the State of New York.

2. That it had a valid claim for $6,176.43 against the Daniel Boone Woolen Mills, Inc., a citizen of the State of Illinois, for goods, wares and merchandise sold and delivered, and that there were no offsets or counterclaims thereto.

3. That the Daniel Boone Woolen Mills, Inc., was largely indebted to divers persons; that it was without means to discharge said indebtedness or cash to meet its current pay-roll; that it had orders on hand aggregating some $400,000, and a great deal of work in process; that creditors were closing in; that great and irreparable injury would ensue and that the assets of said company would be dissipated if the property and assets were not conserved.

4. Plaintiff filed a bill in the Federal Court alleging the foregoing facts; the defendant admitted them because they were true, and the petitioners have not challenged them.

The foregoing facts make out a *prima facie* case of jurisdiction in the District Court. *They do more. They absolutely give the District Court jurisdiction, and make any inquiry into the motives of plaintiff irrelevant.*

Blair v. *Chicago*, 201 U. S. 400, 448.

Wheeler v. *Denver*, 229 U. S. 342, 350.

Re Metropolitan Railway Receivership, 208 U.S. 90.

City of Toledo v. *Toledo Rys. & Light Co.* (C. C. A. 6th Cir.), 259 Fed. 340.

Stephens v. *Ohio State Telephone Co.* (D. C. N. D. Ohio), 240 Fed. 759, 765.

Pennsylvania Steel Co. v. *New York City Ry. Co.*, 157 Fed. 440, 444.

It is said that Mr. Cowan, the attorney who appeared for the Daniel Boone Woolen Mills, Inc., in the Superior Court, stipulated that pending the disposition of the motion for the appointment of a receiver the *status quo* should be preserved. *Mr. Cowan made no such stipulation.* The colloquy between the judge of the Superior Court and respective counsel was rambling—some of it

incoherent—*but the transcript of the proceedings clearly shows that the only thing Mr. Cowan agreed to was that he would serve on counsel for plaintiff any notices or affidavits he was going to present to the Superior Court* (Tr. 58). Mr. Cowan asked that the hearing be postponed until the following Monday, but the Court ruled that the matter should be heard the preceding Saturday. (Tr. 58) *Mr. Cowan* thereupon acquiesced, *which added nothing to the efficacy of the Court's previously announced decision*, whereupon the attorney for *plaintiff* asked:

> "Saturday morning, and everything remains in status [sic] quo?"

and the Court answered:

> "Yes. *Saturday morning*, without further notice." (Tr. 58).

Even the *answer* of the Court is *ambiguous; but it is significant that Mr. Cowan did not agree that everything or anything should remain in statu quo.* Even if he had so agreed, the agreement, *read in the light of the record*, would be *limited* to the giving out of no more sensational news by the officers of the defendant (Tr. 57).

The reason why Mr. Cowan desired a continuance was clearly stated by him.[12] Mr. Byfield had theretofore reported to the *stockholders* that the matter of refinancing

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[12] "Mr. Cowan: The situation, if the court please, is this, without going into the merits of the bill, whether or not the bill sets up such grounds as would warrant this court in entering a receivership; *there are certain important matters now coming before the Board of Directors of this company, which involves some very large amount of finances, and which will be seriously interfered with, if this court undertakes to hear the application, for a receivership. I think those negotiations will be concluded, within a week* and the rights of the complainant, under this bill, will not be affected in any way at all, by allowing this matter to go over for a matter of a week or ten days. I would prefer not to argue the motion this morning, but if counsel insists upon it, of course it will be necessary for me to do it." (Tr. 56).

demanded *their immediate attention* (Tr. 51). *Plaintiff in the Superior Court so alleged.* Plaintiff's bill also alleged that

> "*unless* a receiver for all the assets of the defendant company is *immediately* appointed, after due notice to the officers and directors of said company, *such officers and directors may take precipitate and unwise procedure by creating some species of lien or pledge, or otherwise destroy the credit of the defendant company*, so that it will be impossible for the corporation to function, and its business to be longer continued as a going business." (Tr. 54). See also the prayer on Tr. 55.

Mr. Cowan's statement above quoted unquestionably was intended to allay any fears of the plaintiff's counsel with respect to the action of the officers in the matter of refinancing so far as plaintiff's rights were concerned. What he wanted was time within which the negotiations could be conducted to a tentative conclusion, without disruption by the appointment of a receiver.

The subsequent colloquy—*especially the statements made by counsel for plaintiff*—referred chiefly to *sensational publicity with respect to the alleged tortious acts of the former directors* (Tr. 56-7), *which necessarily injured the company's credit.* Mr. Cowan's agreement, if any, whether express or implied, *when read in the light of the record, the purpose of the proceeding, etc.*, must be limited to the matters above mentioned.

They and none others were *expressly* mentioned during the colloquy. *Neither counsel then had in mind proceedings by some creditor in the District Court.* Counsel for defendant then had no such intention; *and counsel for plaintiff expressed no fears of any such procedure.* If he had entertained any it is certain that he would have expressly mentioned them.

We have gone into these irrelevant matters from a sense of obligation to a reputable member of the bar.

It cannot be denied that the matters are irrelevant, so far as the *jurisdiction* of the *District Court* is concerned. Even if Mr. Cowan had expressly agreed that the *status quo* should in all things be preserved, he could not impair the right of a citizen of the State of New York to invoke the jurisdiction of the District Court. *Mr. Cowan did not represent the United States Worsted Sales Company. The said company was not a party to the proceedings.* The suit instituted by it in the District Court concerned entirely different matters. *It is undisputed that neither the United States Worsted Sales Company nor its counsel knew of the alleged agreement by Mr. Cowan* (Tr. 112, 93).

The District Court was not deceived by plaintiff, for the plaintiff knew nothing of said agreement. It was not deceived by defendant, for the allegations of plaintiff's bill were true, and could not be denied. The most that can be claimed is that a promise made to the Superior Court by Mr. Cowan was not kept. But what relevancy has such claim to the question of the *jurisdiction* of the *District Court?* None whatsoever, even if it were true.

Mr. Cowan could not shut the doors of all other courts to even the Daniel Boone Woolen Mills, Inc., so far as *other controversies* were concerned, to say nothing of shutting the doors of other courts to creditors or other persons who were not parties to the proceedings in the Superior Court.

The Daniel Boone Woolen Mills was left in the hands of its officers. They could still manage its business. The record does not show that any of the officers of the

Daniel Boone Woolen Mills were informed of the al leegd promise by Mr. Cowan, until long after the ap pointment of a receiver by the District Court. But eve if they had been informed of such promise, their subse quent actions would at most subject them to contemp proceedings in the *Superior Court*. The District Court' *jurisdiction* would remain unimpaired, for the reaso that *the essential facts necessary to such jurisdictio under the Acts of Congress existed.*

It is undisputed that negotiations looking to the pro curing of a large loan were in progress when Mr. Cowa appeared in the Superior Court, and that they subse quently failed of consummation (Tr. 82-3, 93, 99). Thi destroyed the last hope of Mr. Byfield and his associates and made inevitable court proceedings of some nature They knew that proceedings in a State court would no foreclose the possibility of bankruptcy proceedings (Tr 103). It was believed that the company's assets wer more than sufficient to pay its creditors, if the work i process and the orders on hand could be filled and *cred itors could be prevented from wrecking the company an dissipating its assets in a free-for-all fight.*

Under the circumstances, Mr. Byfield and his associ ates did what it was their duty to do. The appellant complain, not that the officers of the company, who rep resented the majority stockholders (Tr. 98-9), *agree* to the appointment of a receiver, but that they did no agree to the appointment of a receiver by the *Superio Court* in a proceeding by *minority stockholders* concern ing a purely *intra-corporate* controversy, *when to hav done so would court disaster. Creditors were not par ties to such proceedings, and the assets of the corpora tion would have been, not conserved, but destroyed b them in a free-for-all fight.*

Mr. Solomon attempted to get into communication with Mr. Grand, an attorney at St. Louis, who represented stockholders there, for the purpose of having him take action. However, Mr. Grand was then already on his way to Chicago (Tr. 104), he having seen newspaper reports of the receivership proceedings in the Superior Court (Tr. 84). Mr. Grand came to Chicago for the purpose of protecting his clients, and while here conferred with both Mr. Solomon and Mr. Cowan (Tr. 84, 105). Mr. Solomon referred Mr. Grand to Mr. Stern, of Newman, Poppenhusen, Stern & Johnston, who informed him that a *creditor's* bill, and not a stockholder's bill, should be filed (Tr. 105). Mr. Grand and Mr. Cowan so reported to Mr. Solomon, and asked him the names of creditors (Tr. 105). Mr. Solomon gave them the names of two Chicago representatives of creditors, and called Mr. Stern by 'phone. Mr. Solomon suggested to Mr. Stern that inasmuch as he knew the two representatives in question he get in touch with them. Mr. Stern told him that he could not think of doing such a thing (Tr. 105).

One of the representatives was Mr. Fred Phillipson, the *selling agent* of the United States Worsted Sales Company (Tr. 105). Mr. Solomon thereupon made an appointment with Mr. Phillipson. Mr. Solomon testified:

> "My conversation with Mr. Phillipson was I explained the position of the Boone Woolen Mills, that we had plenty of assets to take care of creditors, that we were shy of working capital, and as a result we weren't able to meet our pay roll, that in order to protect the interests of the company we would like to have the claim—I would like to have his claim to turn over to Mr. Harry Stern for the protection of the company *and creditors* and stockholders of the Boone Woolen Mills. In substance

that is all I said to him. I told him for the pur
of having a receiver appointed in the Federal C
I don't remember whether I told him there wa
application pending for the appointment of a
ceiver in the State Court. I think I told him
had been filed. I don't think I explained to him
disadvantage of the one that was pending in
State Court was that it might result in a b
ruptcy proceeding. *As to what he said, the*
thing was that he couldn't do anything without
sulting New York, that in view of my asking hi
do so, he would be willing to do so, providing he
the consent of his home office in New York; furt
more that in doing it, he had implicit confidenc
turning his claim over to Mr. Harry Stern."

Mr. Phillipson testified:

"To relate all the conversation: When I c
into the room, I was introduced to Mr. Grand
Mr. Cowan. Mr. Grand and Mr. Cowan left
room, and Mr. Solomon said he wanted me to do
a favor. I said I would if I could. *He said, th*
fairs of the Boone Wooden Mills were in bad sh
that they had a lot of rough work at the mill
couldn't get money to complete it, and that it
necessary to apply for a receiver, and that
wanted to apply for a receiver in the Federal C
for the conservation of assets for the benefi
creditors and stockholders. He says, "Will
sign a petition for me to do that?' I says, '*I c*
sign a petition, Frank, without authority from
York.' 'Well,' he said, 'Would you do it if you
it,' *because*, as he said, *it was for the benef*
creditors and stockholders; and I said, 'You ha
show me.' Then he called Grand and Grand c
back into the room and told me that he was an a
ney from St. Louis, representing stockholders
told me about this thing, and that he thought it
the only thing to do so far as stockholders and
as far as creditors were concerned. • • •

Nobody asked me to go over to Johnston's o
I forgot to tell you that when I came into the r
I was talking to Mr. Solomon, Mr. Grand said

the thing to do was to apply for a receiver in the Federal Court, and he mentioned Newman, Poppenhusen, Stern and Johnston. *Mr. Harry Stern of this firm was a personal intimate friend of mine, and I said I would like to talk with Stern before I called New York on the long distance.* I got Harry Stern at his office and told him I would like to see him for about twenty minutes. He said, 'Hurry over.'[13] I told Mr. Stern that I was in Mr. Frank Solomon's room and that Solomon was talking to me about the receiver of the Boone Woolen Mills, and I said to Mr. Stern, '*Will you represent me if I go into this thing?*' He said, 'Certainly, why not?' Mr. Stern is a personal friend of mine, and he didn't say anything about the charges or anything else, and I didn't say anything about them, knowing that the charge would be all right, if any was to be made." (Tr. 95-6).

It therefore appears:

1. That Mr. Phillipson did not have authority to institute the proceedings. He was only a *sales agent* (Tr. 94) and he expressly informed Mr. Solomon that he had no authority to act in the absence of instructions from his principal.

2. That both Mr. Solomon and Mr. Grand informed Mr. Phillipson that such proceedings were necessary, and that they would be for the best interests of both *creditors* and stockholders alike.

3. That Mr. Phillipson asked *to be shown*. While he was willing to do Mr. Solomon a favor if he could, *his first duty was to his principal, and he not only informed Mr. Solomon that he had no authority, but asked to be shown that it was to his principal's interest.*

4. That Mr. Grand was then called in, and explained why a receivership was to the interest of both creditors and stockholders.

5. *That Mr. Phillipson personally employed Mr. Stern and procured his advice.*

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[13] It was very late in the afternoon (Tr. 105).

The case of

Cashman v. *Amador and Sacramento Canal Co.*
118 U. S. 58,

cited by appellants would be in point, if the plaintiff in the case at bar were representing some *resident creditor* who had no standing in the District Court, upon the promise of such resident creditor to employ counsel, conduct the litigation and save plaintiff harmless against any costs or expense and upon plaintiff's agreement that it would not compromise, settle or dismiss the suit without such resident creditor's consent.

Let it be assumed for the purposes of argument that the bill filed in the District Court contains no allegation that the indebtedness of the defendant to the plaintiff is due. The immaturity of an obligation is a defense that may be waived.[1] Such defense was waived in the case at bar by the defendant, Daniel Boone Woolen Mills, Inc., which not only failed to interpose any such defense, but admitted the indebtedness and expressly consented to the appointment of a receiver. The defendant corporation having waived such defense, no one else—particularly the so-called "receivers" appointed by the Superior Court—may object.

Hollins v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 380, 14 Sup. Ct. 127, 128, 37 L. Ed. 1113.

Horn v. *Pere Marquette R. Co.* (Cir. Ct. E. D. Mich. S. D.), 151 Fed. 626 and cases cited—Opinion by Lurton, C. J.

Citizens Bank & Trust Co. v. *Union Mining & Gold Co.* (Cir. Ct. N. D. Ga.), 106 Fed. 97.

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[1] 1 Corpus Juris, p. 1151, § 206:

"Except as otherwise provided by statute as in the case of attachments, the general rule is well settled that an action prematurely commenced before the cause of action has accrued, as upon a debt or demand not yet due, is prematurely brought and cannot be maintained, *provided an objection on this ground is properly and seasonably interposed.*"

Moreover, the appellants below did not challenge the sufficiency of the bill either in the petition filed by them (Tr. 16-22), *or in their assignment of errors* (Tr. 152-155), *or in their Opening Brief. They introduced no evidence whatsoever as to whether plaintiff's claim was or was not due at the time the bill was filed. It is too clear for argument that they cannot raise this question for the first time on appeal, especially in their Reply Brief.* In

1 Corpus Juris, p. 1152, Sec. 398,

it is said:

> "An objection to the premature commencement of an action must be made in the court below, and cannot be urged for the first time on appeal."

Furthermore, the immaturity of an obligation has nothing whatsoever to do with the *jurisdiction* of the court.

In

1 Corpus Juris, p. 1152, Sec. 399,

it is said:

> "*The premature commencement of an action is not a jurisdictional matter, but is one which may be waived, as by a failure seasonably to interpose an objection upon this ground; and it is ordinarily held that if defendant, without objection, appears and pleads to the merits of the action, he cannot thereafter object that it was prematurely commenced.* An objection to a premature commencement may also be waived by a tender in court, or a stipulation for a reference; and it is held that the error or defect may be cured by the filing of an amended or supplemental complaint after the cause of action has accrued, or by an agreement to waive errors, *or by a confession of judgment*, although it has been held that the defect is not cured by a judgment by default."

The petition asked for the surrender of the defen
ant's property, not upon the ground that the bill filed
the plaintiff was defective or insufficient, nor upon t
ground that the District Court was without jurisdicti
of the subject matter, but solely upon the assumpti
that the Superior Court first obtained *constructive* p
session of the property of the defendant corporation.

The jurisdiction of the District Court, either as su
or as a court of equity, was not attacked in the petiti
Except for the supposed prior and exclusive *construct*
possession of the defendant's property by the Superi
Court the jurisdiction of the District Court was not
tacked. The petitioners merely asked that the Distr
Court surrender such property. They *cannot attack*
jurisdiction of the District Court either as a fede
court or as a court of equity for the first time on appe

But even if the appellants' petition had attacked
jurisdiction of the District Court in all respects, the
sult fould not be different.

It is undisputed that the plaintiff United Stat
Worsted Sales Company is a citizen of the State of N
York, and that the defendant Daniel Boone Woolen Mi
Inc., is a citizen of the State of Illinois. The requis
diversity of citizenship therefore existed.

The amount of the defendant's indebtedness to
plaintiff was more than $6,000.00. Hence the amount
volved was sufficient. Even if it be assumed that
bill contained no allegation that the indebtedness w
due, such defense was waived by the defendant, and
one else may complain. Moreover, the immaturity of
obligation is not jurisdictional.

It was averred in the bill filed in the District Court that the defendant was commercially insolvent; and the court was asked to conserve, administer and distribute its assets among creditors. It is clear that the District Court had jurisdiction of the subject matter

> "because the administration of the assets of an insolvent corporation is within the functions of a court of equity * * *"[*]

Another function of a court of equity is the protection of valuable rights in imminent danger of impairment or destruction, especially where common law courts can offer no speedy or adequate remedy.

In

15 Corpus Juris, p. 729, §21,

it is said:

> "Jurisdiction of the subject matter, means not simply jurisdiction of the particular case then occupying the attention of the court but jurisdiction of the class of cases to which the particular case belongs."

And again:

> "Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong; the power to deal with the general subject involved in the action; and, as used in the constitutions and statutes, the word 'jurisdiction' means jurisdiction as to subject matter only, unless an exception arises by reason of its employment in a broader sense. *Such jurisdiction the court acquires by the act of its creation, and possesses inherently by its constitution; and it is not dependent upon the sufficiency of the bill or complaint, the validity of the demand set forth in the complaint, or plaintiff's right to the relief de-*

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[*] *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 380.

manded, the regularity of the proceedings, or the correctness of the decision rendered.

"A party has the legal right to bring his action in any court which has jurisdiction of the subject matter and can obtain jurisdiction of the parties." (pp. 734-36, §35).

See particularly

Brown v. *Lake Superior Iron Co.*, 134 U. S. 530, 534.

Hollins v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 480.

Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491, 500.

Reynes v. *Dumont*, 130 U. S. 354, 394-5.

Kilbourn v. *Sunderland*, 130 U. S. 505, 514.

Sage v. *Memphis and Little Rock R. R. Co.*, 125 U. S. 361, 375,

where the propositions above discussed are expressly passed upon.

The fact that the plaintiff was a simple contract creditor was waived by the defendant, and, of course, the so-called "receivers" of the corporate defendant have no other or greater rights than said defendant. In other words, the case here is in substance precisely like

Brown v. *Lake Superior Iron Co.*, 134 U. S. 530, 534,

where the corporate defendant first consented to the appointment of a receiver at the instance of creditors (one a judgment and the others simple contract, with immature claims), and thereafter sought to withdraw its assent. If the Daniel Boone Woolen Mills, Inc. would be estopped now to attack the jurisdiction of the Dis-

trict Court on the ground that the plaintiff was a simple contract creditor with an immature claim, certainly the "receivers" appointed by the Superior Court would be estopped. What the corporation did, they have done, —if the order appointing them be not wholly void. Furthermore, in the very petition the jurisdiction of the District Court was recognized and *invoked*. The appellants asked

> "for leave to substitute said State Court Receivers' attorneys, Messrs. Blum, Blum & DeLaney, as solicitors in the above entitled cause for said Daniel Boone Woolen Mills, Inc., to the end that the said State Court Receivers may and shall control and dictate the acts and doings of said Daniel Boone Woolen Mills, Inc., as defendant in the above entitled cause." (Tr. 16).

In

15 Corpus Juris, p. 845, § 164,

it is said:

> "But where the court has general jurisdiction of the subject matter a lack of jurisdiction of the particular case may be waived by failure to make timely and specific objections, *or an invocation of or submission to the jurisdiction may raise an estoppel to deny such jurisdiction. So also the parties may, either expressly or by their conduct, waive objections to remedies pursued in courts having jurisdiction of the subject matter.*"

Plaintiff's bill contained the following averments:

> "*The defendant is indebted to the complainant* for goods, wares and merchandise heretofore sold and delivered by the complainant to the defendant in the sum of Six Thousand One Hundred seventy-six dollars and forty three cents ($6176.43); no part of which has been paid, and there are no offsets or counter-claims thereto." (Tr. 3).

The ordinary meaning of *indebted* is "*owing* • • • *the amount owed* • • • as the indebtedness of an individual or corporation." (Century Dictionary.)

Indebtedness was used in this sense by Mr. Jus
Brandeis in *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 4
500, where it was said:

> "The case at bar is also unlike *Re Metropoli*
> *Railway Receivership*, 208 U. S. 90, 109, 110,
> many others, in which there was express consent
> the corporation to the appointment of the receiv
> or where *indebtedness* to plaintiff and the cor
> ration's insolvency were admitted, or the lack
> jurisdiction in equity was waived."

In that case the plaintiff's claim was mature.

It is true that "*indebted*" has a secondary meani
But as a reference to "Words & Phrases" will pro
the courts are not in accord with respect to its te
nical meaning. For instance, in

Slutts v. *Chafee, et al.*, (Wis.) 4 N. W. 763, 7

it was said:

> "The plaintiff alleges, or states that the defe
> ants are indebted to him for the value of the st
> which he lent them, and which they have never
> turned. *The word 'indebted' is significant, for i*
> *a legal term, having a legal meaning, and implie*
> *debt presently payable.* It was so defined by t
> court in *Trowbridge* v. *Sickler*, 42 Wis. 417."[14]

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[14] In

Lum v. *Buckeye*, 24 Mass. (2 Cushm.) 564, 566,

it was said:

> "A party, either in legal or common acceptance, can only
> said to be *indebted* to another *when he withholds from him*
> *which is his due*, which he is *then* bound to pay, and the other
> a right to demand. When only under an obligation to pay
> future time, he becomes indebted by a failure to pay at the
> stipulated, but he cannot be said to be indebted until the da
> payment, because until then he does not withhold that whic
> another's due, and which he has a right to demand."

And in the case of

In re Board of Rapid Transit R. R. Com'rs, 49 N. Y. 8
60, 69:

> "Ordinarily the term 'indebtedness' imports a sum of m
> arising upon a contract, express or implied. In its more gen
> sense, it is defined to be that which is due from one person to
> other, whether money, goods, or services; that which one perso
> bound to pay or perform to another."

V.

The Superior Court was without jurisdiction to appoint receivers.

If the order of the Superior Court appointing receivers was *void*, then, of course, the decision of the District Court must be affirmed. We of course pass over the manifold defects in both bills, which are irrelevant so far as the jurisdiction of the Superior Court is concerned. We base our argument upon a decision of the Supreme Court of Illinois (which is binding upon this court) that the Superior Court has no jurisdiction to appoint receivers of corporations except under Sections 52-54 of the Corporation Act of 1919. The bills filed in the Superior Court do not invoke or show the existence of facts sufficient to authorize the Superior Court to proceed under said act.

The decision we refer to is that of

> *Blanchard Bro. & Lane* v. *The S. G. Gay Co.* 289 Ill. 413.

See, also, the following cases:

> *Coquard* v. *National Linseed Oil Co.*, 171 Ill. 480, 485.
>
> *The People* v. *Weigley*, 155 Ill. 491.

If the Superior Court was without jurisdiction to appoint receivers under the bills filed therein, then, in any case, the order of the District Court must be affirmed.

> *Hammock* v. *Loan and Trust Co.*, 105 U. S. 77, 86.
>
> *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 640.

It is clear, therefore, that the petition herein should be denied.

Respectfully,

RALPH F. POTTER,
EDWARD R. JOHNSTON,
HENRY JACKSON DARBY,
Solicitors for Respondents

APPENDIX.

CORPORATION ACT OF 1919.

"§ 51. Stockholders shall not be held liable for the debts of a corporation (incorporated under the law of this State) because of any unpaid portion of stock liability, until the corporation has been adjudged bankrupt, or an execution upon a judgment or decree of a court of record for the payment of money, after demand made by the officer, has been returned 'no property found' or has remained unsatisfied for ten days after such demand, or the corporation has dissolved or ceased doing business, leaving debts unpaid."

2 Callaghan's Illinois Statutes Ann. Ch. 32, ¶ 51, p. 1916.

"§ 52. After such adjudication of bankruptcy, or after the execution has been so returned, or after ten days subsequent to such demand, or after such dissolution or cessation of business, the officer of the corporation who has charge of the stock records of the corporation, on request of any creditor of the corporation, or his attorney, shall furnish to him a certified list of the names and postoffice addresses of the officers and directors of the corporation and of all persons who were stockholders at the time when the liability to be enforced against them personally accrued, the number and character of shares held by each stockholder and the amount remaining unpaid on their respective shares. In case of failure to furnish such list within three days after such demand, a petition may be presented to the judge of any court of general jurisdiction of the county in which the

principal office of such corporation is located, who sh
have jurisdiction, after two days' notice to such offic
to enter an order directing the delivery of such list.
failure to comply with such order may be treated as c
tempt of such court and published accordingly."

2 Callaghan's Illinois Statutes Ann. Ch.
¶ 52, p. 1925.

"§ 53. After an adjudication of bankruptcy, or aft
an execution has been so returned, or has remained u
satisfied for more than ten days, after a demand mad
or after dissolution or cessation of business leavi
debts unpaid, any creditor may bring suit in equity,
any court having general jurisdiction in the county wi
in which the principal office of the corporation is locat
on behalf of himself and of all other creditors of the c
poration, against all persons who are liable in any w
for the debts of the corporation, by joining the corpo
tion in such suit. Each stockholder may be required
pay his *pro rata* share of such debts and liabilities,
the extent of the unpaid portion of the stock, after e
hausting the assets of such corporation. If any sto
holder shall not have property enough to satisfy h
portion of such debts or liabilities, then the amount sh
be divided among all of the remaining solvent sto
holders to the extent of their then unpaid stock li
bility."

2 Callaghan's Illinois Statutes Ann. Ch.
¶ 53, p. 1925.

"§ 54. Courts of equity shall have full power,
good cause shown, to dissolve or close up the busine
of any corporation, to appoint a receiver therefor w
shall have authority, by the name of the receiver of su

corporation (giving the name) to sue in all courts and do all things necessary to closing up its affairs as commanded by the decree of such court. Such receiver shall, in all cases, be a resident of this State, or a corporation authorized to act as receiver, and shall be required to enter into bond payable to the People of the State of Illinois, for the use of parties interested, in such penalty and with such sureties as the court, in the order of decree appointing the same, may require. In all cases of suits for or against such receiver, or the corporation of which he may be receiver, writs may issue in favor of such receiver or corporation, or against him from the county where the cause of action accrued to the sheriff of any county in the State for service."

2 Callaghan's Illinois Statutes Ann. Ch. 32, ¶ 54, p. 1930.

Office Supreme Court, U. S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926.

No. [redacted] 117

DANIEL V. HARKIN AND UNION BANK OF CHICAGO,
RECEIVERS, ETC.,
Petitioners,

vs.

EDWARD J. BRUNDAGE, RECEIVER, ETC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ADDITIONAL BRIEF FOR RESPONDENT RECEIVER.

RALPH F. POTTER,
Solicitor for Edward J. Brundage, Receiver, Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1926.

No. 609.

DANIEL V. HARKIN AND UNION BANK OF CHICAGO, RECEIVERS, ETC.

vs.

EDWARD J. BRUNDAGE, RECEIVER, ETC., *et al.*

ADDITIONAL BRIEF FOR RESPONDENT RECEIVER.

While relying upon the joint answer of respondents heretofore filed, the receiver begs the indulgence of the Court to present this brief summary of facts.

On February 19, 1925, a simple contract creditor filed its bill in equity in the District Court on behalf of itself and all other creditors averring the inability of the defendant corporation to pay its debts or to meet its pay roll and continue operation, the possession of a large quantity of raw material and goods in process of manufacture, the existence of judgment and matured mortgage indebtedness, the pendency of an attachment suit for $25,000 with others threatened, that its demand and past due paper in the amount of $100,000 was outstanding, that a warrant for unpaid Federal taxes was in the

hands of deputy collectors, and that its assets would be wasted and its good will dissipated unless the court took charge of its affairs. The prayer was that a receiver be appointed to take possession of defendant's property and continue the business until the further order of the court, that such receiver marshall the assets and liquidate the same under the direction of the court, and with the proceeds pay the debts and make distribution as directed by the court. On the same day the defendant filed an answer admitting the allegations of the bill and consenting to the appointment of a receiver in accordance with its prayer. This respondent was forthwith appointed receiver and immediately qualified.

Upon the presentation of the bill counsel for the plaintiff informed the District Court that a minority stockholder had filed a bill against the same defendant in a state court sitting in the same federal district, alleging dissension among the officers and stockholders, waste and embezzlement by previous officers and failure of present officers to take action against their predecessors, and praying that steps be taken under the direction of the court for the recovery of diverted and misappropriated assets, that an election of corporate directors and officers be held under the direction of the court, and that thereafter the receiver be directed to turn over the assets to such newly elected directors and officers. The District Court was further informed that a motion to appoint a receiver had been made in the state court and continued for hearing until February 21, 1925. (Rec., 112.)

On February 21, 1925, the United States District Court for the District of Connecticut appointed ancillary receivers for the property of defendant in its jurisdiction, and on March 12, 1925, an ancillary receiver was ap-

pointed by the United States District Court for the Southern District of Iowa. (Rec., 113.)

No action was taken by the state court on February 21, 1925. The bill then on file misnamed the defendant (Rec., 114), and was so hastily and crudely drawn that although its averments suggested the advisability of a receivership, its prayer contained no petition for the appointment of a receiver. (Rec., 123-124.)

On February 28, 1925, nine days after the appointment of a receiver by the District Court, the state court appointed the receivers appearing as petitioners here, an intervening petition by another stockholder having been filed on February 25th advising the state court of the proceedings had in the United States District Court and repeating the allegations and prayer of the original state court bill. (Rec., 68.) It was not until March 13, 1925, that any pleading filed in the state court contained a formal prayer for the appointment of a receiver. On that date the plaintiff in the original bill and the petitioner in the intervening petition, filed a so-called "Engrossed, Amended and Supplemental Bill." (Rec., 70.)

On March 13, 1925, more than three weeks after the appointment of the District Court receiver, the receivers appointed by the state court filed their petition in the District Court praying for an order upon the receiver to turn over to the petitioners all defendant's property in his possession or under his control, and for leave to substitute petitioners' attorneys for counsel representing the defendant in the District Court in order that petitioners might "control and dictate the acts and doings" of the defendant in the District Court. (Rec., 16-17.) In support of the prayer of the petition it recites the filing of the original bill in the state court and the motion there

on February 16th for the appointment of a receiver; leges that upon the presentation of the motion the att ney appearing for the defendant asked for a continua pending certain negotiations for financing, whereu the court said that the status quo should be preserv and with that understanding the matter would stand c tinued to February 21, 1925, to which defendant's att ney assented; relates the proceedings in the Uni States District Court above detailed and avers on inf mation and belief that the defendant furnished the pla tiff in the District Court with the facts set up in its and otherwise brought about the proceedings in the D trict Court for the purpose of avoiding the jurisdict of the state court; sets out subsequent proceedings the state court and states that petitioners are advi by counsel that the state court acquired jurisdiction the question of the appointment of a receiver and c structive possession of defendant's assets by the p ceedings of February 16, 1925; and that by reason of premises and on the face of the bill filed in the Uni States District Court, that court was without juris tion or power after February 16, 1925, to appoint a ceiver. (Rec., 16-21.)

After the filing of answers by all parties a full hear was had in the District Court, at which the testim of witnesses was taken, the pleadings and orders in state court were presented, and a complete transcript the proceedings there on February 16th, was introduc (Rec., 55-58.) No evidence was adduced tending to sh any misrepresentation or concealment in connection w the District Court suit, or any lack of good faith in plaintiff's claim, or any collusive making or joining parties. (See Respondent's Answer, pp. 68 *et seq.*)

The petition of the state court receivers to turn o to them the property being administered by the Uni

States District Court was denied and on review by the Circuit Court of Appeals the order was affirmed. In addition to the opinion of the Circuit Court of Appeals (Rec., 169), the attention of the court is respectfully directed to the opinion of Judge Wilkerson, who observed the witnesses and considered the evidence in the light of their oral testimony. (Rec., 134.)

It is before the court upon the petition to advance the cause for hearing, that a dividend has been paid to creditors, and that there is no reasonable prospect that assets in the receivers' custody will pay claims in full.

It is respectfully submitted that the orders of the District Court and the Circuit Court of Appeals should be affirmed.

RALPH F. POTTER,

Solicitor for Edward J. Brundage, Receiver, Respondent.

MAR 12 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 117

DANIEL V. HARKIN AND UNION BANK, RECEIVERS,
Petitioners,

vs.

EDWARD J. BRUNDAGE, RECEIVER, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR MODIFICATION OF OPINION AND OTHER RELIEF.

EDWARD R. JOHNSTON,
Pro se.

BYRON S. ADAMS PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States

No. 117; October Term, 1927.

DANIEL V. HARKIN, ET AL., RECEIVERS,
Petitioners,

vs.

EDWARD J. BRUNDAGE, RECEIVER, ETC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

NOTICE.

To Lloyd Whitman, Esq., and Bernhardt Frank., Esq., counsel for petitioners:

You are hereby notified that on Monday, March 12, 1928, at 12 o'clock noon, or as soon thereafter as counsel can be heard, at the Supreme Court of the United States, in Washington, D. C., the undersigned Edward R. Johnston will move the Supreme Court to file his petition for a modification of its opinion rendered February 20, 1928, in the cause therein entitled *Harkin et al.* v. *Brundage et al.*, and for other relief, a copy of which petition is hereunto annexed.

EDWARD R. JOHNSTON,
Pro Se.

We hereby acknowledge timely service of the notice of the above motion and copy of said petition.

LLOYD C. WHITMAN,
Counsel for Daniel V. Harkin et al., Receivers.

IN THE

Supreme Court of the United States

No. 117; October Term, 1927.

DANIEL V. HARKIN and UNION BANK OF CHICAGO, Receivers, Etc.,

Petitioners,

vs.

EDWARD J. BRUNDAGE, Receiver, Etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION OF EDWARD R. JOHNSTON, A MEMBER OF THIS BAR, FOR A MODIFICATION OF THE OPINION AND FOR OTHER RELIEF.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Edward R. Johnston, a member of the Bar of this Court, respectfully asks:

I. For a modification of certain expressions in the opinion in *Harkin* v. *Brundage* (No. 117, Oct. Term, 1927), delivered February 20, 1928; which expressions are, or may be construed as, critical of the professional conduct of your petitioner and/or of his late partner, Henry L. Stern, who died on February 22, 1928, without knowing of the rendition of the opinion.

II. For this Court, if it deems it desirable, to make such further full and complete investigation (through any medium or machinery it considers appropriate): (1) of your petitioner's every act in connection with that case; and (2) of any and all other facts in connection therewith—all to the one end, that this Court, with the fullest possible direct light on the subject, may form its deliberate opinion of your petitioner's professional conduct in the premises.

REASONS FOR MODIFICATION OF THE OPINION.

Your petitioner requests that the opinion be modified in the following particulars:

1. By modifying the following italicized words, so that they will not be construed as including Mr. Johnston or Mr. Stern (Opinion, p. 11):

> "Cowan was its lawyer and a member of the Executive Committee of its directors. He sought and procured the continuance in the State Court. He continued to act as that Company's attorney in his dealings with Grand and in the conferences between Stern and Johnson. When the form of the bill was changed from a stockholder's bill to a creditor's bill *they all, including* Cowan, hunted for a nonresident creditor to consent to file the bill."

because neither Mr. Johnston nor Mr. Stern ever engaged in any sort of hunt for a creditor to act as plaintiff; but on the contrary, Mr. Stern refused to have anything to do with securing a plaintiff to act, and even declined to request his personal friend (Phillipson) to have his company file the bill. (Rec. 105.)

(1) Mr. Johnston knew nothing of the proposed litigation, and had nothing whatever to do with it until *after* Mr. Stern had been retained by Mr. Phillipson to bring the suit in the name of the United States Worsted Sales Co., subject to the latter's approval. (See testi-

mony of Cowan, Phillipson and Solomon as to when they first met Johnston, Rec. 89, 95-96, 106-107.) Indeed, Mr. Johnston had never met, or had anything to do with, Phillipson, Grand, Solomon or Cowan in connection with the Daniel Boone Woolen Company matter prior to Phillipson's employment of Stern and the actual preparation of the bill.*

(2) Mr. Stern, acting for an entirely outside client, had obtained, some 30 days before, confidential information about the Daniel Boone Woolen Mill's affairs from Mr. Byfield, its then president. When Grand approached Stern, looking to Stern's employment, Stern called up Byfield and stated that he would not use any of the information he had thus obtained without Byfield's consent. Thereupon Byfield consented to the use of the data by Stern. (Rec. 100.)

Stern declined to have anything to do with soliciting any creditor to act as plaintiff. (Rec. 105.)

Solomon testified that after Solomon, Cowan and Grand had searched the company's records to find a proper creditor plaintiff (Rec. 105):

> "After the two names had been mentioned, the next thing that occurred was that I telephoned to Mr. Stern, right from the room there, and told him I thought he knew both of these gentlemen (DeLee and Phillipson) and suggested his getting in touch with them. *He said he couldn't consider doing any such thing*, that it was against the ethics of a legal profession for a lawyer to solicit a claim, *and that he was in no way interested in getting in touch.*"

Solomon further testified that he then telephoned Phillipson, saw him in person, and asked him to have his company file the bill. (Rec. 105, 106.) Phillipson after discussing the matter rather fully with Solomon, Grand

*Mr. Cowan was the only one of the men named whom Johnston had ever met and Johnston saw him for the first time in connection with this litigation when the bill was being drawn. (Rec. 89.)

and Cowan consented to have his company act, provided its officers were willing, and telephoned Stern and employed him. (Rec. 96.)

In the evening of that same day, Cowan, Grand, Phillipson and Solomon, went to Stern's office, where, *for the first time*, they saw Mr. Johnston, who in the meantime, at Stern's request, had begun the preparation of a creditor's bill. (Rec. 89, 95-96, 106-107.)

This testimony demonstrates that Mr. Johnston had nothing whatever to do with the hunt for a creditor to act as plaintiff; but, like Mr. Stern, acted only *after* Grand, Cowan, and Solomon had first secured Phillipson's company to act and Stern had been employed.*

II. By adding to the following passage from the opinion (p. 11):

> "The complainant *knew* through Cowan, the fraud by which delay had been secured in the State Court. It was charged with knowledge of that fraud. The *other agents* whom it employed to bring about the result, *even if* they did not know the means taken to secure the delay, were affected with knowledge of it, because they were acting for the Woolen Mills Company in this transaction in its pursuit of a Federal Court receivership."

such explanatory statement as will make it plain that Mr. Johnston and Mr. Stern were *not* meant to be included within the above term "other agents" (or if they were intended to be so included), then, that they had no *actual* knowledge of the fraud that had been perpetrated upon the State Court.

Mr. Johnston knew nothing of the colloquy between

*The statement in Johnston's affidavit (Rec. 111) that he prepared the bill of complaint "from information, most of which had been in possession of affiant for more than 30 days prior to the preparation of said bill," referred to the data furnished by Mr. Byfield to Stern in connection with a proposed purchase by Stern's client of the Boone Woolen Mills (Rec. 100). The affidavit is not technically correct. It should have read "in the possession of affiant's *firm*."

Cowan, Gesas, and the State Court, nor indeed anything that had happened there, except the fact of the filing of the bill, making of the motion for a receiver and its continuance (Rec. 112); and Mr. Cowan so admits. (Rec. 93, 94.) Mr. Stern had no connection with the case beyond the preliminary stages.

Conclusion.

As it has been the very common practice in all the federal courts (especially since *Re Metropolitan Ry. Receivership*, 208 U. S. 90, 110), to have "consent" equity receiverships, where it is arranged in advance for a simple contract creditor to fill a bill, and for the defendant simultaneously to file its answer consenting to the receivership, your petitioner, of course, knew that the receivership was to be a "consent" one. The only fact distinguishing the case at bar from the ordinary "consent" equity federal receivership, is the means employed by the company's counsel to secure the delay in the State Court. But your petitioner *did not know* either when the bill was filed, or when the federal receiver was appointed, *any of the facts constituting what this court has found to be a fraud.* (Rec. 112.)

Your petitioner only learned of the fraud on the State Court, and of the facts constituting it, *at the same time* that the District Court learned those facts, to wit: March 13, 1925 (Rec. 16); and as neither the District Court nor the Circuit Court of Appeals thought that this fraud on the State Court invalidated the federal receivership, it did not occur to your petitioner that he should, on account of this prior fraud, for which he was in no wise responsible, withdraw from the case.

If your petitioner should have withdrawn from the case upon learning of the fraud that had previously been

perpetrated, his failure so to withdraw was only an error of judgment, which it is his belief is pardonable in view of the attitude of the District Court and of the Circuit Court of Appeals.

Wherefore your petitioner, Edward R. Johnston, prays that the opinion may be modified as hereinbefore indicated, and that this Court will take such further action as it deems appropriate.

EDWARD R. JOHNSTON,
Pro se

March 12, 1928.

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March 12, 1938.

Personally, I am always blind, and am convinced that neither Mr. Johnston or Mr. Stern had actual knowledge of Comm's fraudulent conduct when the bill of complaint was filed in the Federal court.

- Lloyd C. Whitman

BENJAMIN F. GOLDSTEIN
ATTORNEY & COUNSELOR
OTIS BUILDING
CHICAGO
TELEPHONE DEARBORN 6244

March 9, 1928

Edward R. Johnston, Esq.,
11 South La Salle Street,
Chicago, Illinois.

Dear Sir:

As solicitors for Harry Hurwitz and Max Goldenberg, complainants in the bill filed in the Circuit Court of Cook County against Daniel Boone Woolen Mills, Inc., Cause No. 435641, we have examined the petition which you propose to file in the Supreme Court of the United States in the case of Harkin et al., vs. Brundage, et al, No.117, for a modification of certain passages appearing in the opinion rendered by said court in said cause, on the 20th day of February, A. D. 1928, and we beg to state that we agree with you that the changes requested in the opinion should be made, as such changes agree with the record and with the facts as we understand them.

Very truly,

Benjamin F. Goldstein